Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1998

THOMAS MARK SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

Petition For A Writ Of Certiorari
From The United States Court of
Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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265PP

QUESTIONS PRESENTED

ISSUE ONE

Whether a conviction under Title 18 U.S.C. Section 1344 (1) may be sustained when the definition of check kiting used by the lower courts conflicts with that used by the U.S. Supreme Court and five different Circuit Courts of Appeals and where the governments definition eliminates the need for the artificial inflation of defendant's checking account balance and also eliminates the requirement that the bank suffer a loss. One deposited check that simply bounced became a bank fraud under the new alternative definition of a check kiting scheme.

Defendant says "No."
Government says "Yes."

ISSUE TWO

Whether a conviction for obstruction of justice may be sustained where it is based upon alleged false testimony made to a Grand Jury and where the government has explicitly failed to specifically set forth the precise false declarations and the factual basis for the alleged falsity. Whether said conviction may be sustained where the government has provided the Jury with twenty-eight declarations of the Defendant and required the jurors to determine if any of those declarations were false without further guidance.

Defendant says "No."
Government says "Yes."

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

OPINIONS BELOW

The case is an appeal from the Sixth Circuit Court of Appeals. The judgment order opinion appears at Appendix A, pages 1 - 10 to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was February 2, 1999. (Appendix A, pages 1-10.) I did file a timely petition for rehearing. (Appendix A, pages 20-29.) A timely petition for rehearing was denied by the United States Court of Appeals on March 11, 1999. (Appendix A, page 19.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

I am appealing to the Supreme Court under Rule 10 since the decision of the Sixth Circuit Court of Appeals conflicts with past decisions of the Supreme Court and several Circuits of Appeals. The matters to be decided consist of urgent national issues that will affect millions of Americans.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

TITLE 18 SECTION 1344 (1) BANK FRAUD

Whoever knowingly executes, or attempts to execute a scheme or artifice

(1) to defraud a financial institution shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

TITLE 18 SECTION 1623 FALSE DECLARATIONS BEFORE GRAND JURY OR COURT

(a) Whoever under oath (or in any declaration, certificate, verification, or statement) under penalty of perjury as permitted under Section 1746 of Title 28, United States Code, in any preceding before or ancillary to any court or grand jury of the United States, knowingly makes any false material declaration or makes or uses any other information, including any book, paper document, record, recording or other material, knowing the same to contain any false material declaration shall be fined under this Title or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

ISSUE ONE

On December 13, 1996, Thomas Mark Smith was convicted of allegedly aiding and abetting Henry Manuel in an alleged check kiting scheme to defraud Sterling Savings Bank out of $189,000.00. The Defendant, Thomas Mark Smith, was sentenced on September 15, 1997. Defendant timely filed a Notice of Appeal to the Sixth Circuit Court of Appeals on September 22, 1997 (Appendix A, page 3). The Sixth Circuit affirmed the conviction in its Judgment filed on February 2, 1999. (Appendix A, pages 1-10.) The Defendant then timely requested a Rehearing which was subsequently denied on March 11, 1999. (Appendix A, page 19.)

Thomas Mark Smith now appeals to the Supreme Court of the United States. The two primary reasons for this appeal follow:

First, the actions of Henry Manuel did not constitute a check kiting scheme under all previous definitions of check kiting schemes. The Sixth Circuit rejected their own definitions of check kiting schemes in United States v. Stone, 954 F2d 1187 (1992) and United States v. Montgomery, 980 F2d 388, 393 (1992). The Sixth Circuit's new definition also necessarily rejects the U.S. Supreme Court's definitions of check kiting as provided in Williams v. United States, 458 U.S. 279, 281 (1982); United States v. Shaffer, 35 F3d 110, 111 (1994). Second, the bank was not defrauded because there was no loss suffered.

The U.S. Supreme Court has jurisdiction to

hear this case under Rule 10 of the Supreme Court Rules. The Sixth Circuit Court of Appeals has entered a decision that conflicts with the 3rd, 4th, 10th, and 11th Circuit Courts of Appeals and the U.S. Supreme Court. Furthermore, conflict now exists within the Sixth Circuit itself. This matter is vitally important to all citizens of the United States that have checking accounts with financial institutions. For the first time in the history of the United States, the federal government has prosecuted a citizen under 18 U.S.C. 1344 (1) for one check deposit that bounced because it was written against a correctly recorded insufficient checking account balance.

In March of 1992, F.B.I. Special Agent Richard Salomon discovered an old bounced check dated May 9, 1991. (Appendix B, page 3.) Agent Salomon testified that Henry Manuel took a blank check drawn against the Defendant's Oakland Title Corporation account at his First of America Bank in Waterford, Michigan. Henry Manuel filled the check out to his own Independent Mortgage Corporation, dated it 5-8-91 and then made it out in the amount of $189,000.00. (Appendix B, page 2.) Henry Manuel then deposited the check into his Sterling Savings Bank account, also located in Waterford, Michigan. According to Agent Salomon, the check then simply bounced on May 14, 1991 because Thomas Mark Smith's checking account registered a correct balance of less than $1,000.00. (Appendix B, page 4.)

This one bounced check against an uninflated checking account was the total involvement of Thomas Mark Smith in Henry Manuel's scheme.

In late 1993, Agent Salomon discovered a

photocopy of an old destroyed check made out to Robert Geissbuhler. (Appendix B, pages 4-5.) According to Agent Salomon's testimony, Robert Geissbuhler had received other bad checks from Henry Manuel and so did not cash or attempt to deposit the $189,000.00 check. Instead, Geissbuhler, after making an inquiry, discovered the check was N.S.F. and proceeded by photocopying the check and destroying the original. (Appendix B, page 9.) Of note, the date on the Geissbuhler check had been altered. (Appendix B, page 53.)

The government claimed Henry Manuel changed the date on the check from April 14, 1991. (Appendix A, page 5.) Robert Geissbuhler testified that the date on the check was April 14, 1991. (Appendix B, page 14.) Geissbuhler further testified that he had requested an extension through the I.R.S. in order to put off his immediate tax obligation. He further testified that he needed the check from Henry Manuel to pay his income tax. In addition, he testified that since the check was no good, he destroyed the original. (Appendix B, page 13.)

The government accepted Geissbuhler's testimony about receiving the check but rejected his testimony about the April 14, 1991 date which appeared on the check. (Appendix A, page 5.) Obviously, if the original check was dated April 14, 1991, there would be no connection between the two checks -- the government would have altered the date on the check instead of Henry Manuel.

The Sixth Circuit Court of Appeals Judgment reads as follows (Appendix A, pages 3-4):

"Defendant points out that 18 U.S.C. §1344(1)

has two requirements:

1) Knowing execution or attempted execution of a scheme or artifice, and
2) Fraud upon a financial institution.

Defendant argues that the evidence in this case is insufficient to satisfy either requirement."

The Defendant did inform the Court of Appeals that the Tenth Circuit clearly set forth the two criteria necessary to find a conviction under 18 U.S.C. 1344 (1). In United States v. Bonnett, 877 F2d 1450 (10th Circuit 1989), the Tenth Circuit clearly defined the two criteria required to sustain a conviction under 18 U.S.C. 1344 (1). The Bonnett Court ruled on page 1453 as follows:

> "The plain language of 18 U.S.C. §1344 sets forth two distinct crimes concerning federally insured financial institutions. Each crime requires a defendant first to knowingly execute a scheme or artifice. To convict a defendant of a crime under subsection (1), the government would have to prove the scheme defrauded the financial institution. To convict a defendant under subsection (2), the government would have to prove the scheme enabled the defendant to obtain certain property by means of false or fraudulent pretenses, representations or promises."

The Court's findings in Bonnett clearly indicate that the Defendant would have to first, execute a scheme, and second, that the scheme would have to defraud the bank.

The Sixth Circuit Court of Appeals Judgment from which this is appeal is made states the following (Appendix A, page 4):

> "With respect to the second requirement, defendant claims there is insufficient evidence of fraud because neither First of America nor Sterling Savings Bank suffered an actual loss. Defendant, however, may be guilty of aiding and abetting bank fraud despite the fact that IMC check no. 1067 was never cashed at Sterling Savings Bank. See United States v. Briggs, 965 F2d 10, 12, 13 (5th Circuit 1992), cert denied, 506 U.S. 1067 (1993); United States v. Solomonson, 908 F2d 358, 363, 364 (8th Circuit 1990); United States v. Mason, 902 F2d 1434, 1441, 1442 and 1443 (9th Circuit 1990)."

The Sixth Circuit failed to recognize that Briggs, Solomonson, and Mason all fall under the umbrella of 18 U.S.C. 1344 (2). Bonnett has ruled only that under section 1344 (1), the bank must be defrauded. Section 1344 (2) covers cases in which the defendant uses false or fraudulent pretenses, representations or promises. The U.S. Supreme Court ruled in United States v. Williams, 458 U.S. 279, 773 (1982) that bad checks are not false or fraudulent pretenses, representations or promises.

The decision of the Sixth Circuit is in direct conflict with the findings in Bonnett. In the instant case, the Court has found a violation of 18 U.S.C. 1344 (1) without any bank ever being defrauded.

The Bonnett Court also found that in order for a violation of section 1344 (1) to be found, the Defendant must have executed a scheme.

The Sixth Circuit defines Henry Manuel's check kiting scheme (Appendix A, page 2):

> "Evidence uncovered during F.B.I.

> investigation indicates that Manuel attempted a check kiting fraud against Sterling Savings Bank by (1) making OTC check no. 5690, drawn on First of American Bank in the amount of $189,000, appear to be a routine real estate transaction between IMC and OTC; (2) depositing OTC check no. 5690 in IMC's account at Sterling Savings Bank, thereby inflating the balance; and (3) writing corresponding IMC check no. 1067 payable to Robert Geissbuhler (Geissbuhler) in the amount of $189,000. Defendant allegedly aided and abetted Manuel by signing and delivering OTC check no. 5690 with knowledge of Manuel's plans."

The Sixth Circuit's check kiting scheme definition contains one deposited check that bounced. This is undisputed because Thomas Mark Smith's checking account balance registered a correct balance of less than $1,000.00. Uncontested testimony was given at trial which indicated that the separate check written to Robert Geissbuhler was destroyed rather than deposited or cashed. (Appendix B, page 9.)

The Sixth Circuit rejected its own definition of a check kiting scheme as provided by United States v. Stone, 954 F2d 1187 (1992) when it found (Appendix A, page 4):

> "According to defendant, there is insufficient evidence of a check kiting scheme because the OTC checking account did not have an inflated balance. Defendant relies on the definition of check kiting in Stone[3]. Defendant, however, ignores the decision in United States v.

> Montgomery, 980 F2d 388, 393 (6th Circuit 1992) which held there is no all-inclusive definition of a check kiting scheme. Defendant points to no deficiency in the check kiting definition used in his case, and we will not overturn his conviction merely because his actions do not satisfy an alternative definition."

In the Sixth Circuit Court of Appeals Judgment in Appendix A, page 4 at footnote 3, the Court quoted Stone and wrote:

> "Check kiting consists of drawing checks on an account in one bank and depositing them in an account in a second bank when neither account has sufficient funds to cover the amounts drawn. Just before the checks are returned for payment to the first bank, the kiter covers them by depositing checks drawn on the account in the second bank. Due to the delay created by the collection of funds from one bank from the other, known as "float" time, an artificial balance is created. United States v. Stone, 954 F2d 1187, 1192 (6th Circuit 1992)."

The Court in Stone clearly requires two things: First, a check is deposited in a second bank and drawn off an account in the first bank and in which neither account has sufficient funds to cover the deposited check. Second, before the deposited check is returned to the first bank, a check is written against the second bank and deposited in the first bank which artificially inflates the first bank's balance and thereby tricks the first bank into

honoring the deposited check.

In the instant case, the Defendant did not artificially inflate his checking account balance by depositing bad checks into his First of America bank account. Instead, the bank recognized that the check written for $189,000.00 was drawn against a balance of less than $1,000.00 and simply proceeded by bouncing the $189,000.00 check. No bank would honor a $189,000.00 check drawn against a balance of less than $1,000.00 unless there existed some contractual credit extension agreement. No such agreement was in place here. The mere facts that Henry Manuel owned a mortgage company, Thomas Mark Smith owned a Title Company, and the word "closing" was written on the check had no impact whatsoever in determining whether a check kiting scheme existed or whether any bank was actually defrauded. The check was deposited on May 9, 1991 and simply bounced on May 14, 1991. No checks were deposited or cashed against that deposited check. In fact, there were no checks written against the deposited check that were ever cashed or deposited.

The Sixth Circuit Court of Appeals ruled there was no need for the Defendant's checking account to be artificially inflated because in United States v. Montgomery, 980 F2d 388 (1992), that Court found there is no such thing as an all inclusive definition of a check kiting scheme. To the contrary, the Montgomery Court made reference to United States v. Street, and found Street did not need to have a substantial sum of money in his account to sustain a conviction. Montgomery claimed he had a substantial amount of money in his account and so the Court had

no jurisdiction to convict him. The Montgomery Court rejected his argument.

In Montgomery, the Court ruled that the Street definition of a check kiting scheme was not an all inclusive definition of a check kiting scheme. Of particular interest, Montgomery went on to provide a definition of check kiting scheme that was consistent to the Stone definition. The pertinent definition provided by Montgomery on page 391 is as follows:

> "An individual writes a check in excess of his account balance in one bank, deposits it in his account in another bank and then reverses the process by writing a check on the second account and depositing it in his first account. By doing this, the individual artificially inflates the balance in both accounts."

The alternative definition provided by the Sixth Circuit Court of Appeals conflicts with the past definitions as provided by Stone and Montgomery because here, the Defendant's checking account was not artificially inflated to trick his bank into honoring his deposited check.

The Sixth Circuit Court of Appeals ruling in this matter is in direct conflict with its own past rulings in Stone and Montgomery, and with the Tenth Circuits ruling in Bonnett. This new and alternative definition of check kiting has never before been adopted by any federal court and its novel implementation against Thomas Mark Smith in the instant case is simply unjust.

The U.S. Supreme Court defined a check kiting scheme in United States v. Williams, 458 U.S. 279 (page 774). The Third Circuit utilized this definition in United States v. Shaffer, 35 F3d 110

(1994). In Williams and Shaffer the Courts stated as follows:

> "The check kiter opens an account at Bank A with a nominal deposit. He then writes a check on that account for a large sum such as $50,000. The check kiter then opens an account at Bank B and deposits the $50,000 check from Bank A in that account. At the time of deposit, the check is not supported by sufficient funds in the account at Bank A. However, Bank B, unaware of this fact, gives the check kiter immediate credit on his account at Bank B. During the several day period that the check on Bank A is being processed from collection from that bank, the check kiter writes a $50,000 check on his account at Bank B and deposits it into his account at Bank A. At the time of the deposit of that check, Bank A gives the check kiter immediate credit on his account there, an on the basis of that grant of credit pays the original $50,000 check when it is presented for collection.
>
> By repeating this scheme, or some variation of it, the check kiter can use the $50,000 credit originally given by Bank B as an interest-free loan for an extended period of time. In effect, the check kiter can take advantage of the several day period required for the transmittal, processing, and payment of checks from accounts in different banks."

The Sixth Circuit has effectively rejected the definitions of a check kiting scheme as provided for in Stone, Montgomery, Shaffer, and Williams. In

place of the long-established definition of a check kiting scheme from the Supreme Court and the Third and Sixth Circuits, the Sixth Circuit has adopted a new alternative definition from the District Court as found in their Second Superseding Indictment and the November 20, 1996 hearing before Judge Borman. Assistant US Attorney Ross I. MacKenzie, the prosecutor, clearly defined this new definition of check kiting on November 20, 1996 (Appendix A, page 86): "You got this scheme to make it look as if it is a way to get Manuel's corporate balance up which is check kiting, and under case law, that has been cited by the government, it is bank fraud."

Prosecutor MacKenzie further defines a check kiting scheme (Appendix B, page 43):

"On or about May 9, 1991, in an attempt to execute the scheme to defraud Sterling Savings Bank, Henry Manuel completed the check signed in blank and given to him by defendant Thomas Mark Smith, making it payable to his company, Independent Mortgage Corporation, in the amount of $189,000.00; caused the check to be deposited into the Independent Mortgage Corporation account at Sterling Savings Bank and then signed and caused to be delivered to Robert Geissbuhler a check drawn against the Independent Mortgage Corporation account at Sterling Savings Bank, check no. 1067, that was dated May 14, 1991, and made payable to Robert Geissbuhler in the amount of $189,000.00."

This new alternative definition has eliminated the need for the defendants' checking account to be artificially inflated. The new alternative definition allows for all check deposits drawn against an

uninflated bank balance to become a check kiting scheme to defraud a bank under 18 U.S.C. 1344 (1) and 1344 (2). The government has not cited any case history of a deposit drawn against an uninflated bank balance as being a check kiting scheme subject to bank fraud offense.

As such, this new definition expands 18 U.S.C. §1344 sufficiently to include bad checks. And according to the following cases, the simple writing of bad checks does not come under federal jurisdiction. For example, the U.S. Supreme Court has specifically found in United States v. Williams, 458 U.S. 279, 774, 775 that federal action is not necessary in bad check cases because such cases are dealt with in a comprehensive fashion by state law.

Also of interest, the Fourth Circuit in United States v. Orr, 932 F2d 330 (1991) ruled as follows:

> "We enter the case on the initial inquiry of whether 18 Section 1344 was meant to establish a bad check law. Of course such a law was not so intended, and the record of the case indicates that the government so agrees. Was it intended to be a basis for criminal prosecution if the bad check was drawn upon an account in a federally chartered Bank? Again, the answer is in the negative. Under 18 U.S.C. §1344(1) and (2) the bank has not been defrauded. As a matter of fact, the bank suffered no loss at all."

As in the instant case, there was no check kiting scheme because the defendant's checking account balance was not artificially inflated. There also was no loss to the bank. Bad checks were written against an uninflated checking account

balance and they simply bounced in the normal course of business.

Also, in United States v. Wright, 60 F3d 240, 242 (6th Cir. 1995), the Court ruled "...thus, the guidelines require a loss."

In United States v. Hall, 129 F3d 569 (6th Cir. 1994), the Court ruled "If sentencing guidelines had contemplated that insufficient fund violations were like bank fraud, it would not have made such a distinction in the commentary."

In addition, in United States v. Stone, 954 F2d 1187, 1192 (6th Cir. 1992), the Court ruled that "simple overdrafts by themselves may not rise to the misapplication of bank fraud." In the Thomas Smith case, there was no overdraft; just a simple bad check.

Agent Salomon detected the $189,000 check in March 1992, 10 months after it simply bounced. There was no loss, and no inflated checking account at the time of detection. The guidelines require a loss at the time of detection. The U.S. Sentencing Guidelines Handbook states that "The general rule in check kiting cases is that the loss is the amount of the overdraft in the affected account at the time of detection of the kite."

Page 5 of the Sixth Circuit Court of Appeals Judgment in this matter states:

> "The attempted bank fraud offense was completed when Manuel issued and delivered IMC check no. 1067, regardless of whether the bank honored or would have honored the check." (Appendix A, page 6.)

The Sixth Circuit is in conflict with not only Williams and Shaffer, but also with the Eleventh Circuit. In United States v. Christo, 129 F3d 578

(1997) the Court ruled:

> "A bank fraud offense is not complete until there is execution of a scheme to defraud. The execution is completed by the movement of money, funds or other assets from the financial institution."

The Sixth Circuit Court of Appeals is in conflict with the first requirement in Bonnett and with 18 U.S.C. 1344 (1) statute itself in that there was no scheme to defraud the two banks. All previous schemes prosecuted under 18 U.S.C. 1344 (1) were check kiting schemes. According to the definitions found in Williams, Shaffer, Montgomery, and Stone, there was no check kiting scheme in existence in this case.

The Sixth Circuit Court of Appeals is in conflict with the second requirement in Bonnett which specifically found that a bank must be defrauded in order for 18 U.S.C. 1344 (1) to apply. The Bonnett Court's second requirement is also found in Williams, Shaffer, Orr, and Christo.

The findings of the Sixth Circuit in the case at bar are in direct conflict with decisions from the U.S. Supreme Court, the 3rd, 4th, 6th, 10th, and 11th Circuit Courts of Appeals. Rule 10 allows the U.S. Supreme Court to assume jurisdiction on Writ of Certiorari when in fact the Appeals Court enters a decision in conflict with the decision of another U.S. Court of Appeals on some important issue.

Clearly the Sixth Circuit has entered a decision that does conflict with five separate Circuits, not to mention the U.S. Supreme Court. The extension of section 1344 (1) is an issue most important to the majority of Americans. Many adults

in this country have, at one time over the last ten years, deposited a bad check into their checking account. The Sixth Circuits findings make their actions criminal under the now extended purview of section 1344 (1). Thomas Mark Smith, the Defendant herein, argues that the Congressional intent of Title 18 U.S.C. 1344 (1) was not to prosecute simple bad check cases, but to prosecute check kiting schemes as defined by Stone, Montgomery, Shaffer, and William's.

ISSUE TWO - MATERIALITY

On February 2, 1999, the Sixth Circuit Court of Appeals found Defendant Thomas Mark Smith could not attack the materiality question because he had not brought it forth as an issue before the trial. The Court of Appeals relied upon the Federal Rules of Criminal Procedure 12(b)2 to find Defendant's challenge on materiality untimely.

In fact Defendant did bring forth the issue of materiality in defense attorney Fred Gibson's Motion To Quash All Counts In The Indictment on August 7, 1996 and the subsequent rehearing on September 3 and November 20, 1996. (Appendix A pages 30-91.) Said Motion encompassed and dealt specifically with Count One and Count Three. The Court ruled it had no authority to rule on the issue of Materiality (See Appendix A page 71) and hence, no further debate was had regarding materiality. Defendant has been placed in the hapless position where each Court claims the issue of materiality must be argued elsewhere.

The government never brought forth evidence or testimony indicating whether Count One or Count Three was material to Henry Manuel's 93-2 Grand Jury hearing or any other matter in the superseding indictment charge. The government's indictment of Thomas Mark Smith merely states that the Defendant made false testimony. The government provided no evidence that the alleged false testimony in Count One or Count Three was material to the 93-2 Grand Jury hearing. The government only stated that his testimony was material in their closing statement but doesn't disclose why the alleged false testimony was material. The government defined materiality in the jury instructions only.

The government set forth six statements in Count One and twenty-two statements in Count Three that Thomas Mark Smith made in the Indictment. Yet they failed to specifically define the precise false declarations. All twenty-eight declarations referred to by the prosecution were and remain factually true. The result is the government presented twenty-eight declarations made by the Defendant and expected the jury to determine which declarations were false.

Defendant's appeal to the Sixth Circuit cited three cases which clearly provide that materiality required the Court to set forth the precise false statements to the jury. In United States v. Gaudin, 132 LEd 2d 444 (1995) page 451, the Court ruled

"Deciding whether the statement is material requires the determination of at least two subsidiary questions of pure historical facts. "A" What statement was made? "B" What decision was the agency trying to make?"

The Superseding Indictment (Appendix B, pages 28-45) does not set forth what precise false statement was made and the government never set forth in the trial what specific declarations it claimed were false. The Sixth Circuit in United States v. Eddy, 737 F2d 564 (1994) page 571 also ruled that

> "In a perjury case, the defendant must not be assumed into the penitentiary.And in United States v. Brumley, supra, 560 F2d at 1277, any reading of the charges in the indictment leads one to believe that it has failed to set forth with sufficient clarity the precise falsehoods alleged, the factual basis of that falsehood and the objective truth in stark contrast so that the claim of falsity is clear to all who read the charge Tonelli 577 F2d a 195."

United States v. Tonelli, 577 F2d 194 (Third Circuit 1978) on page 200 states

> "Because the indictment in this case did not set forth the precise falsehoods alleged and the factual basis of their falsity with sufficient clarity to permit a jury to determine their verity and to allow meaningful judicial review of the materiality of those falsehoods the conviction here must be vacated. As we stated in Slavik to hold otherwise would permit the jury to inject its' inferences into the Grand Jury indictments and would allow defendants to be convicted for immaterial falsehoods or for intent to mislead or perjury by implication which Bronston specifically prohibited at 548 F2d at 83 and 84."

Both Eddy and Tonelli support the proposition

that the juror cannot be given the authority to determine what precise false statements were made. Further, both Eddy and Tonelli require the government set forth the precise false statements that were made and the factual basis for said false statements.

The Supreme Court and the 3rd and 6th Circuit clearly reveal that the convictions cannot stand because:

1) The Trial Court failed to set forth the precise false statements alleged in the Indictment.
2) The Trial Court failed to set forth the factual basis for their falsity with sufficient clarity to permit the jury to determine verity and to allow for meaningful judicial review of the materiality of those falsehoods. In Gaudin, the Court ruled materiality was to be determined by the jury instead of by judicial review. The jury in the instant case never heard the factual basis for the falsity with sufficient clarity so that they could determine materiality.
3) Failure to present the precise falsehoods enables the jury to inject inferences into the indictment and allows the Defendant to be convicted for immaterial falsehoods, intent to mislead, or perjury by implication.

In the instant case, each juror reviewed all twenty-eight statements/answers made by Defendant to determine if there were any false declarations among them. Both Tonelli and Bronston prohibit this.

The Trial Court allowed the use of additional

immaterial falsehoods to convict Thomas Mark Smith on Count One. Specifically, the government demonstrated that Henry Manuel did produce the Credit Agreement and Promissory Note on his own IMC computer. (See Appendix B, page 17.) The government further stated that Henry Manuel turned the original Credit Agreement over to Special Agent Richard Salomon on May 2, 1994, and the original Promissory Note on October 17, 1994. In the Superseding Indictment, it is charged that Thomas Mark Smith made false testimony because he executed and delivered the Credit Agreement and Promissory Note to Henry Manuel on April 21, 1991 (Appendix B, page 36). Yet, since Henry Manuel produced the documents and gave the original to Special Agent Salomon, it is literally impossible for the Defendant to have delivered the documents to Henry Manuel.

Furthermore, the Credit Agreement and Promissory Note provide that Thomas Mark Smith did lend to Henry Manuel $103,500.00 on April 21, 1991. Thomas Mark Smith has never lent Henry Manuel $103,500.00. The Credit Agreement provides on page 4 that for all money loaned, Henry Manuel would provide the Defendant with assignment of mortgages. No evidence or testimony was ever produced which in any way indicated that Henry Manuel ever actually gave the Defendant the assignments of mortgages. The Credit Agreement was never executed on April 21, 1991. In fact, the Credit Agreement was never executed.

The Trial Court committed plain error. Thomas Mark Smith did not execute and deliver any Credit Agreement or Promissory Note on April 21,

1991. As such, the documents are not material to anything because the agreement was neither delivered or performed. In Count Three of the indictment, (Appendix B, page 37) the government alleges the Defendant gave Henry Manuel a $189,000.00 check in order for Henry Manuel to pay a debt he owed to Robert Geissbuhler. The government is aware Henry Manuel filled out said check and proceeded to deposit it into his own Independent Mortgage Corporation account. Henry Manuel then simply allowed that check to bounce. This transaction literally had nothing to do with Robert Geissbuhler. Henry Manuel did then give a check, drawn from his corporate account, to Robert Geissbuhler. Robert Geissbuhler then destroyed that check. Robert Geissbuhler never cashed or deposited that check.

The government alleges in Count Three that Thomas Mark Smith gave false testimony. But the charge fails to specify what false statement was made. The government presented twenty-two questions and answers made by the Defendant, but left it to the jury to try and find the false statements. The government never defined the precise false statements that were allegedly made by Thomas Mark Smith.

Defense attorney Fred Gibson attempted to elicit from the People's witness, Special Agent Richard Salomon the specific false statements which Defendant allegedly made (Appendix B, page 18). After several such attempts, Special Agent Richard Salomon explained that he was not qualified to specify which of Defendants statements where untrue. Similar subsequent questioning resulted in

the government objecting and the Trial Court sustaining the objection (Appendix B, page 18). This material issue regarding the specific false statements was indeed brought before the Trial Court and neither the Defendant nor the jury were ever provided with the precise false statements.

The indictment sets forth 28 questions and answers in Count One and Count Three that are contained in Thomas Mark Smith's May 25, 1993 grand jury hearing.

Thomas Mark Smith did try to explain each answer in his brief to the Sixth Circuit Court of Appeals.

The government never set forth in the indictment or at trial any reason why any of the 28 answers were false.

The government only challenged one answer in the appeal process at the Sixth Circuit Court of Appeals.

The question and answer may be found in the indictment in Appendix B on page 40:

Q. Did you sign a blank check?

A. Not to my knowledge.

Smith did explain this answer by using Black's Law dictionary. Black's Law dictionary defines a blank check as a check that contains only a signature and nothing else. Signing a blank check would not be necessary because it already contains a signature. Thomas Mark Smith's answer would therefore be correct since Manuel already had a check with Thomas Mark Smith's signature.

The statement in the judgment order reads as follows:

"Count Three deals with defendant's

testimony about signing and delivering OTC check no. 5690. Defendant challenges his conviction under this count, arguing that the quoted statement about a blank check was true. Defendant argues that Black's Law dictionary defines a blank check as a check containing only a signature. Accordingly, defendant's testimony that he did not sign a blank check was true as there would be no need for him to sign a blank check a second time. The literal meaning of blank check, however, is a check with nothing written on it."

Furthermore, Thomas Mark Smith did state in his testimony to the grand jury that the signature on the check was his (Appendix B, page 39).

The Sixth Circuit Court is first wrong in that Thomas Mark Smith was not challenging his conviction on this statement because Thomas Mark Smith was never convicted on this particular statement as far as he knew. Thomas Mark Smith was only explaining to the Sixth Circuit what his understanding was concerning this particular question.

Thomas Mark Smith's understanding of the definition of blank check did coincide with Black's Law dictionary definition of blank check, along with Webster's dictionary of blank check. He obviously did not know about the Sixth Circuit's definition of blank check which conflicts with both Black and Webster.

The government only set forth one false declaration that Thomas Mark Smith allegedly made during his testimony at Henry Manuel's grand jury hearing.

The Sixth Circuit did need to apply an alternative definition of blank check, contrary to

both Black and Webster to sustain a conviction for Obstruction of Justice concerning false testimony.

Thomas Mark Smith's conviction on Obstruction of Justice cannot be maintained when the government never attempted to prove materiality by setting forth the precise false statements made by the Defendant until the final hour. Lastly, given the blatant inaccurate basis of the indictment in Count One and Count Three, justice demands this Court vacate Thomas Mark Smith's conviction on Obstruction of Justice.

In Count One, the Second Superseding Indictment sets forth two questions presented by Prosecutor MacKenzie and four questions presented by a juror. Thomas Mark Smith did his best to answer the six poorly phrased questions.

The six questions could have been condensed into one question and answered for the Court to get the pertinent information they were looking for.

Q: What did the four investors expect of Manuel when they gave their money to him?

A: Manuel was supposed to deposit our loan to him in his Citibank account and let it remain there until his foreign loan was approved and return it to us within 10 to 15 days.

Manuel did receive a $103,500 loan from the four investors: Joseph Pietrzyk, Thomas Smith, James Smith, and Charles Conklin. Manuel never paid the loan back and Thomas Smith ended up losing $81,500; his father lost $22,000.

Charles "Pike" Conklin was a real estate broker and small builder. Mr. Conklin was made aware of an overseas investor's group loaning money to American investors. Mr. Conklin's interest in the

foreign investors was to use some of their money for the four investor's investment in a real estate development known as Mariner's Cove. (Appendix B, page 21.)

He passed this information on to Thomas Smith, who in turn gave it to Henry Manuel. (Appendix B, page 21.) Manuel then made contact with the foreign investors.

Manuel told Thomas Smith that to qualify for the loan he had to place $500,000 in a top 100 bank. Manuel asked Thomas Smith if the investors could help with the $500,000.

Charles Conklin contacted Joseph Pietrzyk who wired $50,000 to Manuel's Citibank account in Chicago on 4-22-91. (Appendix B, page 22.) Thomas Smith guaranteed his loan to Manuel. (Appendix B, pages 21 and 26.) Joseph Pietrzyk loaned Manuel $50,000 on 4-22-91. Thomas Smith did not know what Manuel gave him, if anything, for his loan. There is no proof presented that he received anything.

According to Charles Conklin, Manuel needed more money. Conklin agreed to loan him $10,000 which he did on May 10, 1991 (Appendix B, page 23).

James Smith also loaned Manuel $22,00 on May 10, 1991. (Appendix B, page 32.) Thomas Mark Smith loaned Manuel $21,500 on 4-30-91. The money was to remain in the Independent Mortgage account for not more than 10 to 15 days, and was to be returned to the four investors. (Appendix B, page 32.)

Smith and Conklin got nothing for the money they gave Manuel on April 30, 1991 and May 10, 1991. James Smith got a promissory note for his loan.

Manuel did provide two checks to the investors dated 5-16-91. The checks bounced and the investors never recovered their money from Manuel

Since Thomas Mark Smith guaranteed their loans, Smith repaid Joseph Pietrzyk and Charles "Pike" Conklin. (Appendix A, pages 135.) James Smith refused the money because Manuel was to pay him restitution. (Appendix A, page 135.) Thomas Mark Smith lost $81,500, and James Smith is slowly getting restitution.

The six questions asked of Thomas Mark Smith obviously related to the investor's loan to Manuel. The questions do not relate to a April 21, 1991 credit agreement and note that was never executed and delivered to Manuel by Smith. The prosecutor is confused by the word "executed." Apparently he believes it means "signed", rather than "completed" or "closed."

The District Court committed plain error resulting in a manifest miscarriage of justice against Thomas Mark Smith. In the name of justice, his conviction must be overturned.

REASONS FOR GRANTING PETITION

Rule 10

The ruling below has effectively expanded the authority of 18 U.S.C. 1344 (1). The new interpretation classifies the mere writing of a non-sufficient funds (NSF) check as a federal offense. The original intent of 18 U.S.C. 1344 (1) never contemplated the creation of a federal bad check law, yet the lower Courts interpretation allows federal law enforcement to reach back in time as far as ten

years and proceed with prosecution for merely bouncing a check. This new authority apparently exists even without a finding of harm or loss to the financial institution. It should be a matter of urgent and extreme importance to the Supreme Court of the United States.

The Defendant in the case at bar is the first and only Defendant ever to be convicted under federal law for simply bouncing one bad check. The ruling below is in direct conflict with former rulings by the U.S. Supreme Court, and the 3rd, 4th, 6th, 10th, and 11th Circuit Courts of Appeals.

Specifically, United States v. Williams, 81 F.3d 1321 (1996) clearly stands for the opinion that bad check cases are to be prosecuted by the state courts, not federal courts. United States v. Orr, 932 F2d 330 (1991) ruled that 18 U.S.C. 1344 was not meant to establish a bad check law. United States v. Stone, 954 F2d 1187 (1992) provides that simple overdrafts, by themselves, may not rise to the level of misapplication of bank funds. United States v. Bonnett, 877 F2d 1450 (1989) ruled that to be convicted under 18 U.S.C. 1344 (1), the government would have to prove the scheme defrauded the financial institution. United States v. Christo, 129 F3d 578 (1997) found "A bank fraud offense is not complete until there is a movement of money, funds or other assets from the financial institution."

United States v. Wright, 60 F2d 240 (1995) specifically found the guidelines require a loss. United States v. Hall, 129 F3d 569 (1995) states "If the Sentencing Commission had contemplated that insufficient funds violation were like bank fraud, it would not have made such a distinction in the

commentary."

The conviction of Thomas Mark Smith and the rulings below also clearly conflict with former definitions of check kiting as proposed by United States v. Stone, 954 F2d 1187 (1992); United States v. Montgomery, 980 F2d 388 (1992); United States v. Schaffer, 35 F3d 110 (1994); and United States v. Williams, 81 F3d 1321 (1996).

The confliction with former rulings clearly rises to the level which calls for the application of Rule 10. Equally convincing should be the over expanded authority granted by the rulings below which now effectively allows for federal prosecution of all NSF check writers. This new definition of check kiting is a most important national issue because it places virtually every American who has written a bad check within the last ten years in direct violation of 18 U.S.C. 1344 (1).

Thomas Mark Smith is confident that the Supreme Court of the United States will accept his Writ of Certiorari in light of this most important case.

Thomas Mark Smith is also confident that the Supreme Court of the United States will accept his Writ of Certiorari concerning his conviction for obstruction of justice. The Sixth Circuit is in conflict with the Supreme Court, the Third Circuit, and past rulings of the Sixth Circuit. The government is in conflict because they refused to set forth in their indictment and trial the precise false statements Thomas Mark Smith, the factual basis of the false statements, and the true statements in sharp contrast with the false statements, so the jury could determine materiality.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas Mark Smith

Date: 4/20/99

NO. _____

In The
Supreme Court of The United States
October Term 1998

_____♦_____

THOMAS MARK SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

Petition For A Writ Of Certiorari
From The United States Court of
Appeals For The Sixth Circuit

_____♦_____

PETITION FOR WRIT OF CERTIORARI

_____♦_____

APPENDIX A

Thomas Mark Smith
7559 Olde Sturbridge
Clarkston, MI 48348
(248) 625-3276

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APPENDIX A

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 97-2011

Filed February 2, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	ON APPEAL
Plaintiff-Appellee,	)	FROM THE
v.	)	UNITED STATES
THOMAS MARK	)	DISTRICT COURT
SMITH,	)	FOR THE
Defendant-Appellant.	)	EASTERN
	)	DISTRICT OF
		MICHIGAN

Before: CLAY and SUHRHEINRICH, Circuit Judges, and CARR, District Court Judge.*

PER CURIAM

This is an appeal from defendant's convictions and sentence for aiding and abetting an attempted bank fraud and making false declarations before a grand jury. Defendant claims there is insufficient evidence to support his conviction for aiding and abetting attempted bank fraud under 18 U.S.C. §1344(1). Defendant also claims the trial court abused its discretion by assigning an offense level of thirteen under the United States Sentencing

---

*The Honorable James G. Carr, District Judge, United States District Court for the Northern District of Ohio, sitting by designation.

Guidelines. Finally, defendant attacks his conviction for obstruction of justice by making false declarations before a grand jury. For the reasons that follow, we affirm the judgment of the trial court.

Background

This case arises out of a Federal Bureau of Investigation (FBI) inquiry into the activities of businessman Henry Manuel (Manuel) for possible check kiting in November 1990. Manuel is the owner of Independent Mortgage Corporation (IMC). Defendant is the former owner of the Oakland Title Company (OTC), which has done mortgage business with IMC.

Evidence uncovered during the FBI investigation indicates that Manuel attempted a check kiting fraud against Sterling Savings Bank by: 1) making OTC check no. 5690, drawn on First of America Bank in the amount of $189,000, appear to be a routine real estate closing transaction between IMC and OTC; 2) depositing OTC check no. 5690 in IMC's account at Sterling Savings Bank, thereby inflating the balance, and 3) writing corresponding IMC check no. 1067 payable to Robert Geissbuhler (Geissbuhler) in the amount of $189,000. Defendant allegedly aided and abetted Manuel by signing and delivering OTC check no. 5690 with knowledge of Manuel's plans.

On Dec. 13, 1996, a jury found defendant guilty of aiding & abetting an attempted bank fraud and making false declarations before a grand jury.[1]

---

[1] References to the grand jury are to federal Grand Jury No. 93-2, sitting in the Eastern District of Michigan on May 25, 1993.

On September 15, 1997, defendant received concurrent sentences of twenty-one months on each count. The court entered a judgment and commitment order regarding the sentence on September 18, 1997. On September 22, 1997, defendant filed a timely notice of appeal.

Analysis

There are three issues before us. First, defendant claims there is insufficient evidence to support his conviction for aiding and abetting attempted bank fraud under 18 U.S.C. §1344(1). Second, defendant claims the trail court abused its discretion by assigning an offense level of thirteen under the United States Sentencing Guidelines. Third, defendant attacks his conviction for obstruction of justice.

A. Sufficiency of the Evidence

Defendant argues there is insufficient evidence to support his conviction for aiding and abetting attempted bank fraud under 18 U.S.C. §1344(1). Because defendant expressly waived his right to move for a judgment of acquittal under Fed. R. Crim. P. 29, we review sufficiency of the evidence for plain error resulting in a "manifest miscarriage of justice." United States v. Cox, 957 F.2d 264, 265 (6th Cir. 1992).

Defendant points out that 18 U.S.C. §1344(1) has two requirements: 1) knowing execution, or attempted execution, of a scheme or artifice, and 2) fraud upon a financial institution.[2] Defendant argues

---

[2]The relevant portion of the statute reads as follows:

that the evidence in this case is insufficient to satisfy either requirement.

With respect to the first requirement, defendant claims there is insufficient evidence of a check kiting scheme. He contends there is only evidence of an overdraft, which is not covered by 18 U.S.C. §1344(1). See United States v. Hall, 71 F.3d 569, 572 (6th Cir. 1995); United States v. Stone, 954 F.2d 1187, 1192 (6th Cir. 1992).

According to defendant, there is insufficient evidence of a check kiting scheme because the OTC checking account did not have an inflated balance. Defendant relies on the definition of check kiting in Stone.[3] Defendant, however, ignores the decision in United States v. Montgomery, which held there is no all-inclusive definition of check kiting. 980 F.2d 388, 393 (6th Cir. 1992). Defendant points to no deficiency in the check kiting definition used in his case, and we will not overturn his conviction merely because his actions do not satisfy an alternative definition.

Defendant also claims there is insufficient

> Whoever knowingly executes, or attempts to execute, a scheme or artifice (1) to defraud a financial institution. . . shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.18 U.S.C. §1344(1).

[3]In footnote, we stated:

> Check kiting consists of drawing checks on an account in one bank and depositing them in an account in a second bank when neither account has sufficient funds to cover the amounts drawn. Just before the checks are returned for payment to the first bank, the kiter covers them by depositing checks drawn on the account in the second bank. Due to the delay created by the collection of funds from one bank from the other, known at the "float" time, an artificial balance is created. Stone at 1188 n. 1.

evidence of a check kiting scheme because there is no connection between the OTC and IMC checks for $189,000. Defendant contends that the original date on IMC check no. 1067 was April 14, 1991, and that the date was altered to May 14, 1991.[4] While a look at the check shows the month may have been changed from April to May, (Joint App. 688), defendant points to no evidence indicating that this was more than an inadvertent error made and corrected at the time the check was written. Defendant attempts to bolster his version of events with witness testimony from Geissbuhler, but that portion of the transcript is ambiguous at best. (Joint App. 340-41). Resolving such ambiguity is a job for the jury, and that it did so in the government's favor is hardly plain error.

With respect to the second requirement, defendant claims that there is insufficient evidence of fraud because neither First of America Bank nor Sterling Savings Bank suffered an actual loss. Defendant, however, may be guilty of aiding and abetting attempted bank fraud despite the fact that IMC check no. 1067 was never cashed at Sterling Savings Bank. See United States v. Briggs, 965 F.2d 10, 12-13 (5th Cir. 1992), cert denied, 506 U.S. 1067 (1993); United States v. Solomonson, 908 F.2d 358, 363-64 (8th Cir. 1990); United States v. Mason, 902

---

[4]Geissbuhler testified that he destroyed IMC check no. 1067 once he knew the check was no good. (Joint App. 338). If the original date on the IMC check was April 14, 1991, the check would have been destroyed long before May 9, 1991, the date Manuel deposited OTC check no. 5690 in the IMC account at Sterling Savings Bank. Accordingly, the two checks would have nothing to do with one another.

F.2d 1434, 1441-43 (9th Cir. 1990).

The essential element of attempted bank fraud is intent to defraud, not actual loss. In fact, "risk of loss" may not even be an essential element of the offense in some circuits. See e.g., United States v. Wolfswinkel, 44 F.3d 782, 785-86 (9th Cir. 1995). We need not decide whether proof of "risk of loss" is necessary in all cases, however, because the government presented sufficient evidence in the present case.

Defendant's arguments to the contrary are unavailing. The fact that OTC check no. 5690 bounced on May 14, 1991, after its deposit on May 9, three business days later with a weekend intervening, is irrelevant. Once the deposit was made, presentation of checks written during that time period even as late as the morning of May 14, 1991, could have resulted in their being honored and a consequent loss to the bank. (Joint App. 320-322). This was particularly true since the $189,000 deposit was a title company check, against which other checks would more likely be honored than a check from a depositor's individual account for such a large amount. (Joint App. 321).

The absence of any interruption of the banking process by police action has no bearing whatsoever on defendant's conviction. The attempted bank fraud offense was completed when Manuel issued and delivered IMC check no. 1067, regardless of whether the bank honored or would have honored the check.

There is sufficient evidence to support defendant's conviction for aiding and abetting attempted bank fraud under 18 U.S.C. §1344(1).

B. Offense Level

Defendant argues that the trial court abused its discretion by assigning an offense level of thirteen under the United States Sentencing Guidelines. With respect to sentencing issues raised on appeal, the standard of review is clear error, and due deference is to be accorded the court below in its application of guidelines to the facts. United States v. Peters, 15 F.3d 540, 546 (6th Cir. 1994), cert. denied, 513 U.S. 883 (1994).

Defendant argues that the offense level of thirteen is incorrect because his conviction does not fall under United States Sentencing Guideline §2F1.1 in the absence of actual loss.[5] The guidelines, however, clearly state that "[c]onsistent with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss." U.S. SENTENCING GUIDELINES MANUAL §2F1.1, Application Note 8 (1998). Defendant's argument has no merit.

Further, the trial court correctly calculated the offense level based on an intended loss of $189,000. This created a base offense level of six and a specific offense increase of seven levels because the intended loss was more than $120,000. See id.

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[5]Defendant mistakenly relies on United States v. Wright, 60 F.3d 240, 242 (6th Cir. 1995), for the proposition that §2F1.1 requires actual loss. Wright, however, recognizes that the guidelines "expressly establish 'actual loss,' 'intended loss' and 'expected loss' (whichever is greater) as the governing legal rule for fraud cases." Id. at 241. Far from supporting defendant's position, Wright actually refutes it.

§§2F1.1(a), 2F1.1(b)(l)(H). Although defendant aided and abetted rather than actually completing the attempted bank fraud, "[t]he offense level is the same level as that for the underlying offense." Id §2X2.1. See also 18 U.S.C. §2.

Finally, defendant argues that the offense level should be decreased by three levels because it is an attempt. See U.S. SENTENCING GUIDELINES MANUAL §2X1.1(b)(l). Decreases are inappropriate, however, when the party committing the crime "completed all the acts [such party] believed necessary for successful completion of the substantive offense." Id. Manuel completed the fraud when he delivered the IMC check to Geissbuhler, and a decrease in the offense level is therefore unwarranted. See United States v. Watkins, 994 F2.d 1192, 1195-96 (6th Cir. 1993).

To the extent defendant's further arguments are based on his incorrect belief that there was no check kiting scheme, they are disregarded. The trial court did not abuse its discretion by assigning an offense level of thirteen under the United States Sentencing Guidelines.

C. Obstruction of Justice

Defendant attacks his conviction for obstruction of justice. Defendant asserts that the indictment does not set forth any false statements or the factual basis of those falsehoods, challenging the validity of the charges in the indictment itself. Such a challenge is untimely pursuant to Fed. R. Crim. P. 12(b)(2). Moreover, the challenge has no merit. The indictment clearly sets forth the false statements made before the grand jury, actually quoting the

pertinent testimony and setting out the factual basis for the falsehoods. (Joint App. 18-20, 27-30).

Count One deals with defendant's testimony about the existence of a credit agreement and promissory note relating to $103,500 given to Manuel by Smith. Defendant bases his challenge to the validity of count one on the specious argument that he did not deliver an executed agreement and promissory note to Manuel on April 21, 1991. Defendant relies on the fact that the original documents were produced and possessed by Manuel, but cites no authority requiring defendant to have created or held the original documents. There was sufficient evidence to show defendant was aware of documents relating to the $103, 500 despite his testimony to the contrary. Defendant's signatures were authentic, and his fingerprints were on the originals. (Joint App. 219-23, 347, 349-52, 353, 356-59, 413-14).

Defendant also challenges his conviction for making false declarations before the grand jury by arguing that the quoted statements he made before the grand jury do not relate to the relevant documents. According to defendant, because the prosecutor and jury were unaware that the documents existed, they could not possibly have asked questions about them. The argument is easily refuted. The question posed pertained to <u>any</u> documents evidencing the $103,500 investment with Manuel. Defendant did not disclose the documents at that time, and their existence was revealed subsequently during Manuel's testimony.

Count three deals with defendant's testimony about signing and delivering OTC check no. 5690.

Defendant challenges his conviction under this count by arguing that the quoted statement about a "blank check" was true. Defendant argues that Black's Law Dictionary defines a "blank check" as a check containing only a signature. Accordingly, defendant's testimony that he did not sign a "blank check" was true as there would be no need for him to sign the check a second time. The literal meaning of "blank check," however, is a check with nothing written on it. Because there is no evidence indicating that defendant was relying on a legal rather than a literal understanding of the term "blank check," defendant's argument lacks merit.

Finally, contrary to defendant's assertions, the statements were material. The jury was properly instructed about materiality, and defendant does not object to the instruction. Clearly, the jury properly found that his testimony about the non-existence of documents and OTC check no. 5690 was material to the grand jury's investigation of Manuel for wire fraud and attempted bank fraud.

Conclusion

For the foregoing reasons, we AFFIRM defendant's convictions and sentence for aiding and abetting attempted bank fraud and making false declarations before a grand jury.

UNITED STATES DISTRICT COURT
Eastern District of Michigan

UNITED STATES OF AMERICA

v.

THOMAS MARK SMITH, Defendant

Case Number
CR 94-81126-1

Honorable PAUL D. BORMAN

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, THOMAS MARK SMITH, was represented by Steven J. Reina.

THE DEFENDANT: has been found not guilty on Count(s) 2 and is discharged as to such Count(s).

THE DEFENDANT: was found guilty on Count(s) 1, 3, and 4 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1623	False Declarations Before Grand Jury	5/25/93	1

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.5.C. § 1623	False Declarations Before Grand Jury	5/25/93	3
18 U.5.C. §§ 1344 (1), 2(a)	Bank Fraud, Aiding & Abetting	5/8/91	4

The defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed: SEP 18 1997

9/15/97
Date of Imposition of Judgment
PAUL D. BORMAN
United States District Judge

Defendant's SSN: **364-76-1078**
Defendant's Date of Birth: **3/19/60**
Defendant's USM No.: **19478-039**
Defendant's Residence Address: **7559 Olde Sturbridge, Clarkston, MI 48348**

Defendant: **THOMAS MARK SMITH**
Case Number. CR **94-81126-1**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **21** months under Count 1, and a concurrent sentence of 21 months under Count 3, and a concurrent sentence of 21 months under Count 4.

- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3** years under Count 1, and 3 years concurrent under Count 3, and 5 years concurrent under Count 4.

The defendant shall report to the probation office in the district to which the defendant is released within 72 *hours* of release from the custody of the Bureau of Prisons.

- The defendant shall not commit another federal, state or local crime.

- The defendant shall not illegally posses a controlled substance.

FOR OFFENSES COMMITTED ON OR AFTER SEPTEMBER 13, 1994

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 *days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.*

- The defendant shall not own or possess a firearm, destructive device, or dangerous weapon as defined in 18 U.S.C. § 921.

If this judgment imposes a fine, or a restitution obligation, it shall be a condition of supervised release that the defendant pay, as directed by the Probation Office, any such fine, assessments, costs, or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with any additional conditions as listed on the attached page entitled special conditions of supervision

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer at least 10 days prior to any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11) The defendant shall notify the probation officer

within seventy-two hours of being arrested or questioned by a law enforcement officer.
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

-- The defendant shall not incur new charges or open additional lines of credit without the approval of the Probation Department unless the defendant is in compliance with the payment schedule.

-- The defendant shall provide the Probation Department access to any requested financial information.

-- The defendant shall pay any fine and/or special assessment that is still owing that is imposed by this judgment as directed by the Court.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the

schedule of payments set forth on Sheet 51 Part B.

	Assessment	Fine	Restitution
Totals:	$150.00	$59,083.93	

If applicable, restitution amount ordered pursuant to plea agreement.

FINE

- The above fine includes the costs of incarceration and/or supervision in the amount of **$49,083.93**

The defendant shall pay interest on any fine of more than $2,500, *unless the fine is paid in full before the fifteenth day (15th) day after the date of judgment* pursuant to 18 U.S.C. § 3612(f) . All of the payment options in Sheet 51 Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

- *The interest requirement is not waived.*

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

PAYMENT OF TOTAL FINE AND OTHER CRIMINAL MONETARY PENALTIES SHALL BE DUE AS FOLLOWS:

- in full immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the Clerk of the Court, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level: 15
Criminal History Category: I
Imprisonment Range: 18 months to 24 months
Supervised Release Range: 3 to 5 years
Fine Range: $ 5,000.00 to $ 1 ,000,000.00
Total Amount of Restitution: $ n/a

- The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(FILED MAR 11 1999 LEONARD GREEN, clerk)

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	ORDER
THOMAS MARK SMITH, Defendant-Appellant.	)	

BEFORE: SUHRHEINRICH and CLAY, Circuit Judges; and CARR*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
s/Leonard Green, Clerk

---

*Hon. James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

#97-2011

-VS-

THOMAS MARK SMITH,

Defendant-Appellant.

PETITION FOR REHEARING EN BANC

NOW COMES the Appellant Thomas Mark Smith by and through his attorney Steven J. Reina and hereby seeks rehearing en banc based on the arguments presented in his attached brief, which is hereby incorporated by reference.

Dated:
Steven J. Reina P-42423
Attorney for Appellant

REQUIRED STATEMENT FOR
REHEARING EN BANC

I express a belief based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the United States Court of Appeals for the Sixth Circuit

and that consideration by the full court is necessary to secure and maintain uniformity of decisions: United States v. Stone, 954 F.2d 1187 (6th Cir. 1992); and United States v. Montgomery, 980 F.2d 388 (6th Cir. 1992) as well as the cases as cited in Appellant's Brief in Support of Petition for Rehearing En Banc.

Dated:
Steven J. Reina P-42423
Attorney for Appellant

ISSUES

Whether this court should grant rehearing when its' ruling has established a new overly inclusive definition of check kiting?

Appellant: Yes.

Appellee: No .

Whether this court misapplied the definition of intended loss in that they used the face value of the check instead of the inflated value of the check kiting scheme?

Appellant: Yes.

Appellee: No.

Whether this court misapplied the law when they convicted Defendant of obstruction of justice for making false statements without specifically identifying the precise false declarations in the

indictment to prove materiality?

Appellant: Yes.

Appellee: No.

STATEMENT OF FACTS

On February 2, 1999 this court entered a judgement and opinion in reference to Appellant's appeal. With regard to Appellant's allegations that there was insufficient evidence to support a conviction for aiding abetting attempted bank fraud pursuant to 18 U.S.C. 1344 (1), the court mistakenly determined that Montgomery held that there are no all inclusive definitions of check kiting schemes. Instead, Montgomery established that the Street definition was not an all inclusive definition of check kiting.

In the Judgment, the court quoted Stone, as follows:

"Check kiting consists of drawing checks on an account in one bank and depositing them in an account in a second bank when neither account has sufficient funds to cover the amounts drawn. Just before the checks are returned for payment to the first bank, the kiter covers them by depositing checks drawn on the account in the second bank. Due the delay created by the collection of funds by one bank from the other, known as the "float" time, an artificial balance is created." Quoted at subsection four of the Judgment.

The definition provided by Stone totally comports with all check kiting definitions found in the Federal Reporter series as well as the Justice

Departments own Financial Institution Fraud Federal Prosecution Manual as prepared by Chief of the Fraud Section, Criminal Division of the U.S. Department of Justice.

Significantly, the Court did not quote from Montgomery, but instead said

> ". . .Montgomery. . .held there is no all inclusive definition of check kiting. (Citation omitted.) Defendant points to no deficiency in the check kiting definition used in his case, and we will not overturn his conviction merely because his actions do not satisfy an alternative definition." Judgment at subsection four.

Appellant filed his motion for rehearing en banc contending that the court's mistaken assertion that Montgomery established there are no all inclusive definitions of a check kiting scheme is in error and should be reversed along with his underlying conviction for bank fraud based upon the check kiting component of 1344 (1).

LAW AND ARGUMENT

As indicated, see infra, in the Statement of Facts, the court held in Montgomery that there is no all inclusive definition of check kiting. Opinion at subsection 4.

A close reading of Montgomery clearly shows that the Montgomery court only held that those defendants' reference to the check kiting definition utilized in United States v. Street, 529 F.2d 226, was not an all-inclusive definition.

Significantly, the Court did not quote Montgomery, but instead said

> ". . . Montgomery . . . held there is no all inclusive definition of check kiting. (Citation omitted). Defendant points to no deficiency in the check kiting definition used in his case, and we will not overturn his conviction merely because his actions do not satisfy an alternative definition." Judgment at subsection four.

Yet the Defendant did indeed point out the deficiency in the check kiting definition used in his case. Specifically, the deficiency was that the Defendant's checking account was not artificially inflated.

The court has erred in that both Stone and Montgomery stand for the same propositions of law because both cases found, the following two requirements must be present for check kiting to be found:

1. First, that the check is written off an account which contains an insufficient balance in the first bank to cover the check and then deposited into an account at a second bank which also contains an insufficient balance;

2. Second, to cover the insufficient balance in the account in which the check was written, the kiter deposits a NSF check to artificially inflate the balance in the original account.

It is clear that all check kiting bank fraud cases to date, including Stone and Montgomery, always require finding both of the two afore-mentioned elements in order to find check kiting. Indeed, if Defendant's conviction is not overturned, Thomas M. Smith will be the first to have been convicted of a check kiting bank fraud violation

where both elements are not present.

In the present ruling, the court appears to have abandoned the second requirement:

> "According to defendant, there is insufficient evidence of a check kiting scheme because the OTC checking account did not have an inflated balance. Defendant relies on the definition of check kiting in Stone." Judgment at subsection four.

The alternative definition of a check kiting scheme that this court has adhered to as evidenced by the conviction of Thomas Smith clearly interprets that a check kiting is simply the depositing of a NSF check and writing a check against the NSF check.

The District Courts definition removes the requirement that the deposited check was written off of a subsequently inflated bank account, and also appends to the definition what previously was not part of the check kiting scheme, namely the execution of the bank fraud offense. This court identifies the execution of the check kiting scheme offense as being the writing of an NSF check against the deposited check. This has never before been identified as being part of any check kiting scheme definition.

After a check kiting scheme has been conducted the kiter then executes his bank fraud offense as he used the scheme to move money from the bank into his pockets. Christo calls this the movement of money out of the bank a completion of the bank fraud offense, not the completion of a check kiting scheme.

Such an all inclusive reading of 1344 (1) is contrary to established law as the U.S. Supreme

Court has rejected bad check law. See Williams v. United States, 458 US 279.

Therefore, contrary to the holding of the Court in its judgment, all check kiting bank fraud cases clearly require two accounts which are used to mutually reinforce each other. Indeed, the gravamen of the check kiting offense occurs when the float time is thereby created.

Finally, after the check kiting scheme is in place, the bank fraud offense is not completed until funds are withdrawn from the inflated account. As stated in United States v. Christo, 129 F.3d 578,

"A bank fraud is not complete until there is an execution of a scheme to defraud, the execution is completed by the movement of money, funds or other assets from the financial institution."

All former check kiting scheme convictions have consisted of the movement of funds out of the bank and into the defendant's pockets. This is why Chief Judge Gilbert Merritt, in United States v. Wright, 60 F.2d 240, ruled that the guidelines require a loss.

In all former attempt convictions for bank fraud involving 18 U.S.C. 1344 (1), the defendants artificially inflated their bank balances. They executed a portion of their scheme but were unable to complete the scheme because their actions were detected. These defendants, however, were charged for the total amount of the inflated balance at the time of detection.

The defendant in the instant case, Thomas M. Smith, was charged for the face value of the check instead of the inflated amount present in the bank account, namely because there was no inflated bank

account and consequently no check kiting scheme.

In cases of attempted check kiting schemes such as found in United States v. Watkins, 994 F.2d 1192 (1993), United States v. Strozier, 981 F.2d 281 (1992) , and United States v. Williams, 81 F.3d 1321 (1996); the amount of loss to the bank is determined as either what the inflated balance of the checking account was at the time of detection minus three levels or, the partial loss to the bank at the time of detection, whichever is greater.

The defendant in the instant case caused no partial loss to any financial institution because his checking account balance was not artificially inflated.

Under this court's interpretation, any person depositing a check and writing a bad check against it, is immediately within the purview of 18 U.S.C. 1344 (1) and may well face prosecution. The end result is a bad check law which, as previously stated, is a concept that has already been rejected by the U.S. Supreme Court.

In the instant case, the Court error is especially significant due to the fact that Appellant's facts do not have a situation wherein there even was a transaction back into the original account as contemplated under both Stone and Montgomery.

In the instant case, another kiter obtained a check which had been signed but not filled out by Appellant. The actor then filled out the check and deposited it into an account controlled by him. Under the People's version of events, he then wrote another check on his account to a third party who failed to deposit it.

Specifically, Henry Manuel (Manuel) wrote an

NSF check off the first bank. Manuel deposits that check in the second bank on May 9, 1991. According to this Court's new all inclusive definition of what constitutes check kiting, Manuel has already created a check kiting scheme.

Manuel then completed the execution of the scheme by writing a NSF check to the third party, Robert Geissbuhler (Geissbuhler), allegedly on May 14, 1991. Geissbuhler never deposited this check, he merely destroyed it.

Under the People's theory, the 1344 (1) violation consisted of the potential bank exposure to loss. However, the conviction below was for check kiting in violation of 1344 (1) . As demonstrated, there was no deposit back into Appellant's account so therefore there could be no check kiting.

Far from being a different type of check kiting, the actions constituted a simple overdraft which, as provided under Stone, is not cognizable as an offense under 1344 (1) at 1194. In other words, it is established federal law that overdrafts are not a violation of 1344 (1) . See United States v. Hall, 129 F3d 569, United States v. Williams, 458 US 279. The court in United States v. Orr, 932 F.2d 330, further buttresses this argument:

> "We enter the case on the initial inquiry of whether 18 U.S.C. 1344 was meant to establish a bad check law of course, such a law was not intended, and the record of the case indicates that the Government so agrees. Was it intended to be a basis for criminal Prosecution if the bad check was drawn upon an account in a Federally charted bank? Again, the answer is in the negative."

This court also misapplied the law when it found obstruction of justice for making false statements without specifically identifying the precise false declarations in the indictment to prove materiality.

Due to the fact that Court erred in rendering its judgment, such judgment should be reversed because along with the underlying conviction from which Appellant now appeals.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,

v

D-1 THOMAS MARK SMITH, Defendant.
_____/

CRIMINAL NO. 94-81126

HON. PAUL D. BORMAN

VIO. 18 U.S.C. § 1624 (PERJURY)
18 U.S.C. §§ 1344, 2 (BANK FRAUD, AIDING & ABETTING)

NOTICE OF HEARING

DEFENDANT, THOMAS MARK SMITH'S MOTION TO QUASH ALL COUNTS IN INDICTMENT

MEMORANDUM IN SUPPORT OF MOTION TO QUASH ALL COUNTS IN INDICTMENT

AFFIDAVIT OF ATTORNEY

EXHIBITS

CERTIFICATE OF SERVICE

Submitted By.
FRED L. GIBSON (P-39530)
Attorney for Defendant
38600 Van Dyke, Ste. 220
Sterling Hgts., MI 48312
(810) 268-3500

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	CRIMINAL NO. 94-81126 HON. PAUL D. BORMAN
v	VIO. 18 U.S.C. § 1624 (PERJURY) 18 U.S.C. §§ 1344, 2 (BANK FRAUD, AIDING & ABETTING)
D-1 THOMAS MARK SMITH, Defendant. _____/	

NOTICE OF HEARING

TO ALL PARTIES OF RECORD:

PLEASE BE ADVISED that Defendant, THOMAS MARK SMITH's Motion To Quash All Counts In Indictment will be brought on for hearing, before the Honorable Paul D. Borman, on a date and time to be determined by the Court.

DATED: August 7, 1996
BECKER & GIBSON, P.L.C.-MACOMB
s/FRED GIBSON
BY: FRED L. GIBSON
Attorney for Plaintiff
38600 Van Dyke Ave., Ste. 220
Sterling Hgts., MI 48312
(810) 268-3500

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	CRIMINAL NO. 94-81126
	HON. PAUL D. BORMAN
v	VIO. 18 U.S.C. § 1624 (PERJURY)
D-1 THOMAS MARK SMITH, Defendant. /	18 U.S.C. §§ 1344, 2 (BANK FRAUD, AIDING & ABETTING)

DEFENDANT, THOMAS MARK SMITH'S
MOTION TO QUASH ALL COUNTS IN INDICTMENT

Defendant, THOMAS MARK SMITH, respectfully submits his Motion to Quash All Counts In Indictment entered with the Court on March 5, 1996.

As its basis for such Motion, Defendant submits the attached Brief, along with a copy of the Indictment issued against one THOMAS MARK SMITH.

In further support, Defendant affirmatively states:

1. THERE HAS BEEN AN EXCESSIVE, UNREASONABLE AND UNNECESSARY DELAY BETWEEN THE TIME THE GOVERNMENT BECAME AWARE OF THE ALLEGED CONDUCT

GIVING RISE TO THE WITHIN INDICTMENT AND THE TIME THE INDICTMENT WAS RETURNED AND THEREAFTER BROUGHT TO COURT SUFFICIENT TO PRECLUDE DEFENDANT'S RIGHT TO A FAIR TRIAL.

2. THE DECLARATIONS MADE BY THOMAS MARK SMITH IN A PROCEEDING BEFORE GRAND JURY NO. 93-2 WHICH THE GOVERNMENT RELIES UPON TO SUPPORT COUNT I OF THE INDICTMENT ARE NOT "MATERIAL" TO THE MATTER(S) THEN AND THERE UNDER INVESTIGATION BY GRAND JURY NO. 93-2, THEREFORE, COUNT I SHOULD BE DISMISSED.

3. THE DECLARATIONS MADE BY THOMAS MARK SMITH IN A PROCEEDING BEFORE GRAND JURY NO. 93-2 WHICH THE GOVERNMENT RELIES UPON TO SUPPORT COUNT II OF THE INDICTMENT ARE NOT "MATERIAL" TO THE MATTER(S) AND THERE UNDER INVESTIGATION BY GRAND JURY NO. 93-2, THEREFORE, COUNT II SHOULD BE DISMISSED.

4. IT IS A FACT THAT NO FINANCIAL INSTITUTIONS SUFFERED EITHER A LOSS NOR "RISK OF LOSS" CAUSING AN INHERENT DEFECT, REQUIRING DISMISSAL OF COUNT III OF THE INDICTMENT.

WHEREFORE, upon the basis stated above as supported by the attached documents,

Defendant, THOMAS MARK SMITH, respectfully requests the dismissal of all counts of the Indictment.

DATED: August 7, 1996

BECKER & GIBSON, P.L.C.-MACOMB
s/FRED L. GIBSON
BY: FRED L. GIBSON (P-39530)
Attorney for Plaintiff
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II. THE DECLARATIONS MADE BY THOMAS MARK SMITH IN A PROCEEDING BEFORE GRAND JURY NO. 93-2 WHICH THE GOVERNMENT RELIES UPON TO SUPPORT COUNT I OF THE INDICTMENT ARE NOT "MATERIAL" TO THE MATTER(S) THEN AND THERE UNDER INVESTIGATION BY GRAND JURY NO. 93-2, THEREFORE, COUNT I SHOULD BE DISMISSED. 6

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QUESTIONS TO BE PRESENTED

I. HAS THERE BEEN AN EXCESSIVE, UNREASONABLE AND UNNECESSARY DELAY BETWEEN THE TIME THE GOVERNMENT BECAME AWARE OF THE ALLEGED CONDUCT GIVING RISE TO THE WITHIN INDICTMENT AND THE TIME THE INDICTMENT WASRETURNED AND THEREAFTER BROUGHT TO COURT SUFFICIENT TO PRECLUDE HIS RIGHT TO A FAIR TRIAL?

Defendant answers: "Yes"

II. WERE THE DECLARA TIONS MADE BY THOMAS MARK SMITH IN A PROCEEDING BEFORE GRAND JURY NO. 93-2 WHICH THE GOVERNMENT RELIES UPON TO SUPPORT COUNT I OF THEINDICTMENT "MATERIAL" TO THE MATTER(S) THEN AND THERE UNDER INVESTIGATION BY GRAND JURY NO. 93-2?

Defendant answers: "No"

III. WERE THE DECLARATIONS MADE BY THOMAS MARK SMITH IN A PROCEEDING BEFORE GRAND JURY NO. 93-2 WHICH THE GOVERNMENT RELIES UPON TO SUPPORT COUNT II OF THE INDICTMENT "MATERIAL" TO THE MATTER(S) THEN AND THERE UNDER INVESTIGATION BY GRAND JURY NO. 93-2?

Defendant answers: "No"

V. DID THE FACT THAT THE FINANCIAL INSTITUTIONS SUFFERED NEITHER A LOSS NOR "RISK OF LOSS" CAUSE AN INHERENT DEFECT REQUIRING DISMISSAL OF COUNT III OF THE INDICTMENT?

Defendant answers: "Yes"

STATEMENT OF FACTS

An Indictment issued on or about March 5, 1996 against Thomas Mark Smith charging Mr. Smith with two counts of making **false declarations before a Grand Jury** in violation of 18 U.S.C. § 1624 and one count of knowingly having aided and abetted Henry Manuel in attempting to execute a scheme to defraud a financial institution in violation of 18 U.S.C. § 1344 **(Exhibit 1-Indictment)**.

As the Indictment indicates at page 2, paragraph 4 of Count One:

> Specifically, the Grand Jury was investigating whether Henry Manuel had devised and carried out a scheme to defraud certain investors in or about April and May, 1991. The evidence of the scheme included the following:
>
> A. On or about September 12, 1991, one Joseph Pietrzyk, had filed a complaint with the Oakland County Sheriff's Department against Henry Manuel for providing him with a bad check in the amount of $50,000.

It was not until nearly **four and one-half years later** that the attached Indictment issued. As a result of such lengthy and inexcusable pre-indictment delay, Defendant's 5th Amendment to Due Process has been violated.

ARGUMENT

I. THERE HAS BEEN AN EXCESSIVE, UNREASONABLE AND UNNECESSARY DELA Y BETWEEN THE TIME THE GOVERNMENT BECAME AWARE OF THE ALLEGED CONDUCT GIVING RISE TO THE WITHIN INDICTMENT AND THE TIME THE INDICTMENT W AS RETURNED AND THEREAFTER BROUGHT TO COURT SUFFICIENT TO PRECLUDE HIS RIGHT TO A FAIR TRIAL.

The government, in its case in chief, relies upon certain financial transactions in 1990-91. As a result of the pre-indictment delay, Defendant is now unable to obtain records from his financial institution to support his contention that he was the victim of fraudulent activity on the part of Henry Manuel as such financial institution record **no longer exists** as all such records are routinely destroyed after five years. The records crucial to Mr. Smith ' s defense are for calendar year 1990.

Rule 48(b) of the Federal Rules of Criminal Procedure provides in relevant part that, if there is:

> Unnecessary delay in presenting the charge to a grand jury or in filing an information 'against a defendant who has been held to answer to the district court, or if there is

> unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

As the Committee Note to Rule 48 states, the provision for dismissal by the court is "a restatement of the inherent power of the court to dismiss a case for want of prosecution. " 8A *Moore's Federal Practice,* § 48.01(2). A trial court's disposition of a Rule 48(b) motion will be reversed only for an abuse of discretion. *See, e.g., United States v Scott,* 518 F.2d 261, 169 (6th Cir. 1975).

Bringing charges after a lengthy and inexcusable pre-indictment delay violates Defendant's Fifth Amendment Right to Due Process. Pre-indictment delay must always be scrutinized under the Fifth Amendment. *United States v MacDonald,* 456 U.S. 1; 71 L.Ed.2d 696; 102 S. Ct. 1497 at 8. The government's conduct here shocks the conscience and violates fundamental conceptions of justice, fair play and decency. *United States v Talbot,* 825 F.2d 991, 999 (6th Cir. 1987).

Dismissal of charges due to pre-accusatory delay is proper where a defendant shows actual prejudice, and where the government intentionally or recklessly delayed the indictment to gain the tactical advantage. *See, e.g., United States v Lovasco,* 431 U.S. 783, 791; 52 L.Ed.2d 752; 97 S. Ct. 2044 (1977); *United States v Marion,* 404 U.S. 307, 325-26; 30 L.Ed.2d, 468; 92 S. Ct. 455 (1971).

This Defendant submits that he will inevitably be prejudiced by a trial involving events which occurred five or six years prior to the matter being brought to trial. Defendant would certainly have been in a better position to respond in 1991 than he

would be today, and there has been absolutely no need shown for the government's delay. Certainly, the government's delay between indictment and accusation is not only untenable, but inexcusable.

Under the *Marion* test, at 325-26, this court is required to examine the facts of each case in deciding a motion to dismiss due to pre-accusatory delay:

> Actual prejudice to the defense of a criminal case may result from the shortest and the most necessary delays; and no one suggests that every delay -- caused detriment to a defendant's case should abort a criminal prosecution. To accommodate sound administration of justice to the rights of a defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case.

In *United States v Duncan*, 763 F.2d 220 (6th Cir. 19__), *citing Lovasco*, the Sixth Circuit held:

> In *Lovasco*, the Supreme Court 'stated that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.' The court stated the test to be whether the delay 'violated those fundamental conceptions of justice which lie at the base of our civil and political institutions. . .and which define the community's sense of fair play and decency.' 431 U.S. at 790; 97 S. Ct. at 2049 [citations omitted].
>
> This court [the Sixth Circuit] has interpreted *Lovasco* to provide that '[d]ismissal for a pre-indictment delay is warranted only when the

defendant shows substantial prejudice to his right to a fair trial and that the delay was an intentional device by the government to gain a tactical advantage.' *United States* v *Greene*, 737 F.2d 572, 574 (6th Cir. 1984) (quoting *United States* v *Brown*, 667 F.2d 566, 568 (6th Cir. 1982) *(per curiam). See also, United States v Booher*, 641 F.2d 218 (5th Cir. 1981). Both parts of the test must be met before a defendant is entitled to have the indictment dismissed. [Citations omitted]

Here, the government was investigating this case for at least the last six years. The government has in its possession sufficient physical evidence to have presented it all to a grand jury a year and a half before the indictment was unsealed and the prosecution begun. The evidence which the government has obviously covers a wide range of activities, but in no case do those activities occur past April, 1991.

The allegations have not changed; the overt acts have not changed; the dates and timing have not changed; there is no reason for not having brought this indictment earlier or, at the very least, for not having brought the matter to court when the complaint was issued in 1994.

As a consequence of the government's unreasonable and calculated delay, witnesses are gone and/or forgotten, including those witnesses whom this Defendant might have otherwise been able to provide as alibi witnesses. This Defendant's memory of specific dates, places and times has, by the very nature of the passage of time, diminished dramatically.

Prejudice to this Defendant comes also in the

form of the potential inability on the part of some witnesses to recognize who was -- and more importantly *who was not* -- at or near a particular site, at or near a particular time, doing a particular thing with one or more particular individuals.

The tactical advantage to which the Sixth Circuit made repeated reference in *Duncan* is defined as whether or not the delay occasioned by the government can be *perceived* as an intentional device on the part of the government to gain a tactical advantage.

The government's tactical advantage garnered by not indicting the individuals for four years after it had begun its investigation is obvious: it has called all the witnesses it needs, and created a situation in which this Defendant is now called upon to reconstruct from memory events which occurred as much as six years ago, while the government has all of the names, dates, places and things wrapped up in a nice tight package with a fancy bow on top as a consequence of its ability to use the grand jury to its advantage, and to manipulate the circumstances to its tactical advantage by indicting when it chooses to.

The instant case is clearly one which evidences a failure on the part of the government to proceed in a fair and expeditious manner.

Similarly, nothing has been produced to suggest that witnesses were unavailable to the government or difficult for the government to bring to the Grand Jury between November of 1991 and March of 1996 when it finally got around to indicting this Defendant.

Obviously the government has had before it all of the information needed for several years. Not only

did it not indict until it felt like indicting, but once indicting the Defendant in this and the companion case, it did not bother bringing the indictment to a court to begin the process of litigation and adjudication for a year and a half after that. That is unconscionable and shocking, and should not inure to the detriment of this Defendant.

This Court's discretionary power under Rule 48 should be utilized to implement the speedy trial guarantees of the Sixth Amendment and of the Speedy Trial Act as well. Certainly, the Rule permitting Defendant to move to dismiss the indictment does not grant the accused less rights than the Sixth Amendment. *Mathies v United States,* 374 F.2d 312 (US App DC 1967). Indeed, as the court in *Mathies, supra,* indicated, a court has power to dismiss an indictment even though there has been no constitutional violation. Dismissal under Rule 48 may indeed rest on non-constitutional grounds, such as want of prosecution or calendar control. *United States* v *Clay,* 481 F.2d 133 (7th Cir. 1973).

The negligence, or in this case, intentional manipulation, of the government in causing a delay must be counted against the government. *United States v Houston,* 450 F. Supp. 131 (DC Tenn. 1978).

II. THE DECLARATIONS MADE BY THOMAS MARK SMITH IN A PROCEEDING BEFORE GRAND JURY NO. 93-2 WHICH THE GOVERNMENT RELIES UPON TO SUPPORT COUNT I OF THE INDICTMENT WERE NOT "MATERIAL" TO THE MATTER(S) THEN AND THERE UNDER INVESTIGATION BY GRAND JURY NO. 93-2, THEREFORE, COUNT I

SHOULD BE DISMISSED.

As stated within the Indictment, on May 25, 1993, Thomas Mark Smith gave testimony in a proceeding before Grand Jury No. 93-2. Such Grand Jury was conducting an investigation to determine whether violations of Title 18 U.S.C. § 1343 (Wire Fraud); § 1344 (Bank Fraud); and 2314 (Inter-State Transportation of Stolen Monies) had been committed by one Henry Manuel **(Page 1, Paragraph 2 of the Indictment).**

On May 25, 1993, Defendant, Smith appeared as a witness under oath at a proceeding before the above-referenced Grand Jury. It is alleged that Smith "knowingly made the following declarations in response to questions regarding the investors' monies":

> Q. What happened then, after you provided the money to him?
> A. So the money was provided. Mr. Manuel indicated that it was, that the investors overseas had confirmed it, and that he was going to depart for Vienna.
> Q. Again, is there any restrictions [sic] placed on the money that you are providing to him; in other words --
> A. (Interposing) It was to sit on the account. There was no fees Mr. Manuel had to pay to obtain the loan. It was strictly a show of cash deposit from his die showing that he had some liquid assets, and the money was to sit there for no more than two weeks, ten days, and that it would be returned to us. **(Page 20 of T. of Thomas Mark Smith's testimony before Grand Jury No. 93-2, May 25, 1993.)**

Q. Basically, was your agreement based on a handshake or on a legal document.
A. Mr. Manuel gave my father a note that said he would pay back $44,000 by a certain date. **(Page 32 of T. of testimony of Thomas Mark Smith before Grand Jury No. 93-2, May 25, 1993.)**

******

Q. So of the four investors, your father is the one that --
A. (Interposing) Right. Myself and Mr. Conklin basically handshaked. I'm not sure if Mr. Pietrzyk got any agreement.
Q. No notary, nothing on that document?
A. No, it's a promissory note. It's not a recordable document.
Q. I understand that. W as there any other documents?
A. As far as our money, no. **(Page 33 of T. of testimony of Thomas Mark Smith before Grand** Jury No. 93-2, May 25, 1993.)

Assuming, for sake of argument that Smith's statements were not true, such statements were not **material** to the matter being investigated by such Grand Jury.

18 U.S.C. § 1623 False Declarations Before Grand Jury or Court:

(a) Whoever under oath . . . in any proceeding before or ancillary to any court or Grand Jury of the United States knowingly makes any false material declaration or uses any other information, including any book, paper, document, record, recording, or other material, knowingly the same to contain any false

material declaration, shall be signed. . .
[Emphasis added.]

THE LAW

The essential elements of perjury are that: (1) declarant was under oath; (2) testimony was given in a proceeding before a court of the United States; (3) the declarant knowingly made a false statement; and (4) the statement was material to the proceeding before the court. *United States* v *Simone* 627 F. Supp. 1264 (DC NJ 1986).

The test of **materiality** is whether the false testimony is capable of influencing the tribunal on the issue before it, but the statements need not be material to any particular issue although it may be material to a collateral material that might influence the Court or Jury in question of questions before the tribunal; to establish its case, the government bears the burden of proving materiality. The government meets its burden of proof either by entering a transcript of prior proceedings into the evidence or by presenting testimony from persons who witnessed the proceedings; the issue is a question to be decided by the Court and is not an issue for the Jury to determine; such evidence bearing solely on the materiality should be received outside the presence of the jury; the trial court thereafter should embody its finding on materiality in an instruction to the jury. *United States v Damato* 55 F.2d 1371 (CA5 AL 1977).

Further, the standard for proving materiality is that deliberate, false declarations of the accused must have tended to influence, mislead or hamper the Grand Jury's investigation of the matter before it

which is within the Grand Jury's authority to investigate. *United States v. Beitling*, 545 F.2d 1106 (CA8 MO 1976) *cell. den.* (1977) 430 U.S. 918, 51 L.Ed.2d 597, 97 S. Ct. 1334.

There is no evidence before this Court or which has been provided to the Defendant to indicate that the statements by Defendant, Smith were either deliberate or made for the intended purpose to influence, mislead or hamper the Grand Jury's investigation of the matter which it was investigating, e.g. the **activities of one Henry Manuel!**

III. THE DECLARATIONS MADE BY THOMAS MARK SMITH IN A PROCEEDING BEFORE GRAND JURY NO. 93-2 WHICH THE GOVERNMENT RELIES UPON TO SUPPORT COUNT II OF THE INDICTMENT WERE NOT "MATERIAL" TO THE MATTER(S) THEN AND THERE UNDER INVESTIGATION BY GRAND JURY NO. 93-2, THEREFORE, COUNT II SHOULD BE DISMISSED.

This particular matters requires little discussion as the government's counsel in his question to Mr. Smith in the proceedings before Grand Jury No. 93-2 on May 25, 1993 prefaces a question to Mr. Smith specifically stating that the question he is about to be asked is not material to the ongoing investigation of Henry Manuel:

[By Ross MacKenzie, U.S. Attorney]

> Q. Now, Mr. Smith, I want to show you one other document that is not related to ... I'm just going to show you another document. It

has nothing to do with this transaction that we have talked about ... **(P. 4, p. 9 of T. of testimony of Thomas Mark Smith before Grand Jury No. 93-2 on May 25, 1993.)**

Then U.S. Attorney MacKenzie proceeds to inquire of Mr. Smith about his knowledge of a certain check that was found to be in the possession of the subject of the Grand Jury proceedings, one Henry Manuel.

Notwithstanding the fact that Mr. Smith responded that the first time he had ever seen such check was "two weeks ago" when the FBI Agent in charge of the investigation showed it to him. The government alleges that such statement in and of itself was a lie and, as such, charged him **again** with a **second** five year felony.

IV. IT IS A FACT THAT NO FINANCIAL INSTITUTIONS SUFFERED EITHER A LOSS NOR "RISK OF LOSS" CAUSING AN INHERENT DEFECT, REQUIRING DISMISSAL OF COUNT iii OF THE INDICTMENT.

Defendant is charged with aiding and abetting Henry Manuel in attempting to execute a scheme to defraud a financial institution and to obtain monies, funds and credits owned by, or under the custody or control of, a financial institution, to-wit: The Sterling Savings Bank of Lake Angelus by means of false and fraudulent pretenses and representations. (Count III of the Indictment at pp. 11 and 12.)

The documents presented to the Grand Jury and which are not at issue, confirm the following:

1. On or about May 8, 1991, Defendant, Thomas Mark Smith signed and provided to Henry

Manuel a blank check, number 5690, written on the general account of the Oakland Title Company in order to assist Henry Manuel with respect to a debt Henry Manuel owed to one Robert Geissbuhler;

2. On or about May 9, 1991, Henry Manuel made the blank check payable to his company, the Independent Mortgage Corporation, in the amount of $189,000, and had it deposited into the Independent Mortgage Corporation's account with Sterling Savings Bank of Lake Angelus in Waterford, Michigan;

3. As a result of this deposit, Sterling Savings Bank credit Independent Mortgage Company's account in the amount of $189,000;

4. On or about May 9, 1991, Henry Manuel signed and had delivered a check No. 1067, dated May 14, 1991, drawn on the Independent Mortgage Corporation's account with the Sterling Savings Bank in the amount of $189,000 made payable to Robert Geissbuhler falsely purporting to be repayment of a debt Manuel owed to Geissbuhler;

5. On or about May 14, 1991, First of America Bank returned the Oakland Title Company check signed by Defendant Thomas Mark Smith for insufficient funds.

Neither financial institution upon which the checks were drawn or to be drawn from suffered a "loss" or a "risk of loss" and as such, Count III of the Indictment should be dismissed. As the court held in *United States v Medeles* 916 F.2d 195 (CAS TX (1990):

> For purposes of 18 U.S.C. § 1344, depositing of series of checks known to have insufficient funds does not alone constitute "false or

> fraudulent pretenses [or] representations II since neither language of the statute nor legislative history supports such interpretation.

Further, as the court held in *United States v Orr* 1932 F.2d 330 (CA4 NC 1991):

> Individuals who wrote checks which bank returns due to insufficient funds did not violate 18 U.S.C. § 1344 since the bank suffered no loss, and Congress did not intend bank fraud statutes to cover ordinary state law offenses.

It is not at issue the fact that Henry Manuel filled out a check in the amount of $189,000, deposited such check with the financial institution where he maintained his account, waited a sufficient length of time such that his financial institution rejected the deposit, causing no loss whatsoever to First of America Bank or Sterling Savings Bank or risk of loss to either financial institution. Upon rejection of such deposit, Henry Manuel then, knowing full well that the rejection had occurred, wrote another check from his own account to a third party, a check which was never presented to Manuel's financial institution.

Defendant, Smith in the Grand Jury proceedings, affirmatively stated that the first time that he saw the check at issue was approximately two weeks before his testimony, during a meeting with the FBI Agent conducting the Manuel investigation (p. 35 of T. of testimony of Thomas Mark Smith before Grand Jury No. 93-2, May 25, 1993). Smith also confirmed that he did not write such check for such amount. *Id.*

The government's case is built upon nothing more than conjuncture, inference, and less than substantial circumstantial evidence.

RELIEF REQUESTED

Wherefore, upon the basis stated above, Defendant, Thomas Mark Smith respectfully requests an Order of this Court dismissing each and every count contained within the Indictment.

Respectfully submitted,
BECKER & GIBSON P.L.C.-MACOMB
s/FRED L. GIBSON
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DATED: August 7, 1996

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	CRIMINAL NO. 94-81126 HON. PAUL D. BORMAN
v	VIO. 18 U.S.C. § 1624 (PERJURY)
D-1 THOMAS MARK SMITH, Defendant. _____/	18 U.S.C. §§ 1344, 2 (BANK FRAUD, AIDING & ABETTING)

AFFIDAVIT IN SUPPORT

STATE OF MICHIGAN)
)ss
COUNTY OF MACOMB)

FRED L. GIBSON, being first duly sworn, deposes and states that I am the attorney for and on behalf of the Defendant, THOMAS MARK SMITH; that the facts stated in the annexed Motion are within my personal knowledge, except for those facts stated to be upon information and belief, and as to those facts, I testify to any and all said facts if called as a witness.

s/FRED L. GIBSON

Subscribed and sworn to before this 7th day Aug., 1996.

s/REBECCA L. GILLESPIE
Notary Public, Macomb County, MI
My Commission Expires: 09-11-99

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	Criminal Case No. 94-81126 Detroit, Michigan September 3, 1996
-vs-	)	
THOMAS MARK SMITH, Defendant	)	

TRANSCRIPT OF MOTION
BEFORE THE HONORABLE PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: ROSS I. MACKENZIE, ESQ.
Assistant U.S. Atty.

For the Defendant: FRED L. GIBSON, ESQ.

Court Reporter: Ronald A. DiBartolomeo, CSR
740 U.S. Courthouse
Detroit, Michigan 48226
(313) 962-1234

Detroit, Michigan
Tuesday, September 3, 1996

- - -

THE CLERK: Court calls Case Number 94-81126, USA versus Thomas Mark Smith.

THE COURT: Will counsel please identify themselves beginning with the government?

MR. MACKENZIE: Ross MacKenzie, Assistant U.S. Attorney.

THE COURT: Okay. And for the defendant?

MR. GIBSON: Please the Court, Fred L. Gibson on behalf of Thomas M. Smith.

THE COURT: And seated with you at counsel table?

MR. GIBSON: Mr. Smith

THE COURT: Okay. This is your motion, Mr. Gibson. Why don't you proceed?

MR. GIBSON: Your Honor, would you like me at the podium?

THE COURT: Please.

MR. GIBSON: Your Honor, I know the Court has had the opportunity to review my motion and brief. So suffice to say, I will be brief.

THE COURT: Was this indictment sealed because I show the indictment came down in March of 96, is that correct?
Is that when the indictment came down?

MR. MACKENZIE: Original indictment was issued in March of 96.

THE COURT: That helps. Thank you.

MR. GIBSON. Your Honor, as the record would reflect, there was a complaint issued in this proceeding in 1994, April I believe.

THE COURT: November. It shows November.

MR. GIBSON: November, yes.

Your Honor, how in depth would the Court like me I to--

THE COURT: Suit yourself. The afternoon is young. I should state that I have read this, but I think you are arguing excessive delay motion to quash, which as you know is usually a difficult burden for you to cross. So I think it is incumbent on you to go right ahead and feel free to elaborate as you feel necessary.

MR. GIBSON: That's correct. As the Court indicated, the burden is upon the defendant in this case.

With regard to the first issue, the hurdle is extremely high. I know the Court reviewed the cites in my brief. I just want to emphasize with regard to that particular issue, your Honor, the matter from which all of these proceedings though regarding Mr. Smith occurred in April of 1991.

The government would like the Court to believe, and if this matter proceeds to trial, will attempt to introduce evidence that was a scheme, a master plan. At least there was on-going activity between Mr. Smith and Mr. Manuel, who was, as the Court is aware of, was, in fact, convicted of a criminal matter in the federal district court stemming from all of these events, and as a result, they are going to try to have a jury, or this Court believe that because of the connections with a wrongdoer, he is just as wrong. Because of on-going activities with Mr. Manuel prior to April 1991, the Court should believe he had a wrongful intent.

Your Honor, because of the fact that all of

events, of which these events occurred in excess of five years now, we are not in a position to present a full and adequate case on behalf of Mr. Smith.

THE COURT: Well, in terms of specificity in terms -- you state witnesses are gone. You can't document, you don't know specifically who's gone, who's died, who's forgot, and that's helpful. If you could elaborate in Page 2, what records specifically no longer exist, and in terms of backing up the calendar year 90, what's specifically is there that's gone, and in terms of individuals, what are we missing that's got to be the factual guts of the evidence here?

MR. GIBSON: Thank you, your Honor.

Your Honor, one of the charges that Mr. Smith is charged with has to do with a check. The amount is important at this point in time, but it concerns a check that was written from an account that was maintained in a business being operated by Mr. Smith in 1990 and before.

The check, in order for me to present a full case on behalf of Mr. Smith, the check from which the government has utilized as a basis for a, the account was allegedly written in 1991. Your Honor, that check was taken out sequence. There was series of checks that was written, and I believe the records of the bank would conclude were written in 1990.

Now subsequent to the filing of my motion with this Court, the government and I and the agent in charge of this case met and conferred in preparation for trial, and in effect, the government did provide me with records from the bank, First of America Bank that I was searching for. Unfortunately, that's all that the government has.

The First of America Bank representatives assured me that beyond five years, I can't get the records, not because they wouldn't give them to me, but because they don't exist, not on microfilm, not on microfiche. They are gone.

With regard to individuals, and your Honor with regard to that count, that's what I am looking at, the bank records, and somebody from the bank to assure me that the records that they may have had or that Mr. MacKenzie has graciously provided to me--

THE COURT: That's the count that we are speaking of?

MR. GIBSON: That's correct.

THE COURT: Okay.

MR. GIBSON: -- are, in fact, correct, and also to tell me, lay a foundation for the accuracy of the records and sequence of the checks that came through. I can't get that. They don't exist. Far as the recollection of individuals, the Court can take judicial notice we either have, depending on what we are facing, a great memory recollection or a great memory loss over the passage of time.

We are talking about really five individuals involved in this case. The individuals that were defrauded, and the defendants, or at one time a defendant, Mr. Manuel and his memory. I am more concerned about our individuals and our witnesses and Mr. Conklin, Mr. Pietrzyk, Mr. Jim Smith and, of course, my client Tom Smith, and those are the individuals that we are talking about, and again, I understand that hurdle is extremely high to overcome, and may --

THE COURT: Jim Smith that you spoke of --

this is Thomas Mark Smith. Who is --

MR. GIBSON: The father.

THE COURT: Okay. I want to make sure who was in charge of personnel.

MR. GIBSON: He may have been.

THE COURT: I know that person and this person, and they are not the same.

MR. GIBSON: If I may on Mr. Smith, there were two pending, two perjury counts in front of the grand jury. The proceedings occurred in 1993, in May of 1993, your Honor. I pointed out the specifics in those two counts as to the issue of materiality. I pointed out the portions of the transcript of FBI agent Richard Salomon, and also a portion of the transcript where Mr. Salomon was asked certain questions by Mr. MacKenzie, the U.S. Attorney, and still the U.S. Attorney on that case, where he prefaces the fact, I will ask you certain questions, and it doesn't have anything to do what we were talking about before, but I want to ask, you had absolutely nothing to do with the issue before the grand jury which was Henry Manuel. The issue or the person investigated was Henry Manuel as a result of those proceedings, the fact there was an indictment by and against Henry Manuel, which he pled guilty, and the rest is history.

The point is, Mr. Smith was not under investigation. What he indicated at the time was to the best of his recollection, period. The fact that the government prefaced their questions to Mr. Smith, oh, by the way, I have something that I want to ask of you, but it has nothing to do with what you are here on, it is -- it is not sufficient for those two issues, on the issues of materiality.

Your Honor, moving on to the next issue, having to do with aiding and abetting bank fraud, what the Court has to decide is the issue of loss and risk of loss.

Now there are cases that go both ways.

THE COURT: Here, there was no loss.

MR. GIBSON: Right.

THE COURT: And government concedes that I believe, is that correct?

MR. MACKENZIE: Yes, your Honor. There was no actual loss.

MR. GIBSON: That is the issue. Does it matter? Obviously, your Honor, I cited the cases that support our position, and government cited cases that supports their position. We say it does matter. They say it doesn't matter. The point is, they are trying to do something. The bank, as the Court is well aware of, has instituted safeguards that hold onto checks just to assure that this type of event does not occur.

Assuming that everything the government says against Mr. Smith is true, and he was trying to defraud a bank, or aid and abet defrauding a bank, it is impossible. It can't happen because of the safeguards that the federal institution has instituted to protect themselves against the Mr. Henry Manuels or of the Mr. Tom Smiths of the world. If you assume the allegations are true, it didn't occur. They didn't risk any risk of loss.

The government says, listen. The bank records, in fact, reflects an addition or accrual to an individual's account. Yes, that's true, but they didn't suffer the loss or the risk of loss, and the bank that the records reflect on the accrual is not the bank at

issue in this case. It is another bank.

Your Honor, I know that you have reviewed my brief and the cites therein, and I think that's sufficient.

THE COURT: I will hear from Mr. MacKenzie, and since you have burden, I will call you back if you wish to respond.

MR. GIBSON: Thank you.

THE COURT: Mr. MacKenzie, let me ask you a question.

The complaint was issued in November of 1994, correct?

MR. MACKENZIE: Yes.

THE COURT: At that point Mr. Smith was put on personal bond, is that correct?

MR. MACKENZIE: Yes.

THE COURT: And he reported in all the time, correct?

MR. MACKENZIE: Yes.

THE COURT: Okay. In 1996 when the indictment was issued, did you go out and have him arrested?

MR. MACKENZIE: No, your Honor.

THE COURT: I show a request for warrant, but not arrested. He was allowed to turn himself in?

MR. GIBSON: I think the record should reflect, and Mr. MacKenzie will indicate, that the complaint was dismissed.

THE COURT: I understand that. When indicted, did he turn himself in or was he arrested?

MR. GIBSON: He was arrested.

THE COURT: At his home or place of business?

MR. GIBSON. Place of employment.

THE COURT: They handcuffed him?

MR. GIBSON: I apologize. Mr. Smith came in voluntarily.

THE COURT: Arrested on the complaint, but not on the indictment?

MR. GIBSON: Correct.

THE COURT: It shows request for warrant but not executed.

MR. MACKENZIE: That's right.

THE COURT: Thank you. Let's proceed.

What took so long?

MR. MACKENZIE: Well, your Honor, what happened was after the complaint was issued, then we proceeded to enter into negotiations with Mr. Gibson for a period of time. At that point the undercover conversations had been recorded and done. We had corroborating evidence that, in fact, Mr. Smith had lied before the grand jury with respect to the documents that he indicated to the grand jury did not exist.

THE COURT: But getting back to 1990, basically you seem to argue, I guess, Mr. Manuel pled guilty. He testified or brought out evidence against the defendant, Mr. Smith?

MR. MACKENZIE: That's correct.

THE COURT: When did he plea guilty?

MR. MACKENZIE: He had pled guilty in -- he pled guilty I believe in August of 1994. There had been negotiations through his attorney prior to that time, and there were documents that Mr. Manuel had provided through his attorney prior to actually pleading, the earliest being March of 94. After he pled guilty, he entered into an agreement to cooperate with the United States, and we conducted

some conversations by telephone and personal meetings with the defendant. Those were recorded.

THE COURT: Between the period of March and November of 94?

MR. MACKENZIE: Actually between August and November of 94.

THE COURT: Okay.

MR. MACKENZIE: In October. I believe it was October 17, 1994, the original of the promissory note was supplied by Mr. Manuel to the government. Upon the conclusion of the recorded conversations, the complaint was issued. Mr. Smith was arrested. Some negotiations ensued with defense counsel. There was no resolution at that point, and the government then proceeded to have the documents analyzed by its experts for fingerprint and handwriting analysis. Grand jury subpoenas were issued to have Mr. Smith provide exemplars.

THE COURT: Do you have the dates of those occurrences? I don't think they are in your brief.

MR. MACKENZIE: They are not.

THE COURT: And that would be helpful as to the time frame.

MR. MACKENZIE: I don't have it with me. I think Mr. Thomas -- Mr. James Smith might know the dates. He is raising his hand.

MR. JAMES SMITH: The date that Mr. Salomon received the credit agreement was May 2, 1994, and Mr. Manuel was tried. The settlement was made on August 3, 1994. So the prosecution had that documentation for four months.

THE COURT: No, no. My only question, do you know what day your son came to the grand jury to give handwriting examples? Maybe Mr. Gibson

knows that date.

MR. GIBSON: I don't. I didn't come here prepared to help the government.

THE COURT: I understand.

MR. MACKENZIE: I can give you when the subpoena was issued and returned. In January -- I put it in the brief -- in January of 1995 subpoenas were issued to First of America Bank where the records relating to First of America accounts, particularly the one for the $189,000 check that was issued on it.

THE COURT: What do you have to say about the five years and files being gone and checks being gone and that sequence?

MR. MACKENZIE: The only thing I can indicate to the Court, first, I have no idea what documents specifically are not available. I know that what we requested was turned over, and if anything was missing at that time, it was missing then within the five year period.

I would also indicate to the Court that subsequent to this, when counsel and I met, a check dating from 1990 -- a copy of a check was produced from that very account by the defendant, whether the source was the bank records or defendant on record, I don't know, but the apparently the defendant has some records of that account dating from the relevant period they are interested in, 1990.

We have given defense counsel what we have. I think it is adequate. It shows again, without knowing what they need or what they are looking for, that has not been produced. I am at a lost to respond. I will tell the Court we have produced for inspection, copies of four First of America bank

accounts for Oakland Title Company. Maybe three, and those were along with a number of other bank accounts, but focusing on those --

THE COURT: What dates?

MR. MACKENZIE: I will tell you that in just a second, your Honor. Okay. We had records from the account that the $189,000 check was written, November 30th through August 31st of 91. We have the First of America bank records for Oakland Title Company, a different account from May 31, 89 through May 31 of 91, and also First of America bank records for a third account with Oakland Title Company, but I don't have the period of time those covered.

THE COURT: Okay.

MR. MACKENZIE: In addition, all Citibank of Chicago records were made available where the wire money was into, and Sterling Savings Bank records where Mr. Manuel had an Independent Mortgage account, and those are definitely the primary accounts that we are talking about. There may be other bank records as well that Mr. Gibson --

THE COURT: Footnote 3, the government plans to supersede. Do you know --

MR. MACKENZIE: September 9th. What I plan to do, your Honor, I want to add the wire fraud charge relating to Mr. Pietrzyk. I have talked that over with Mr. Gibson. I don't believe there will be no additional evidence regarding document or paperwork, and no need for delay based on that addition.

THE COURT: Okay. That would be a wire fraud?

MR. MACKENZIE: Yes. With respect to the

loss of memories, Mr. Conklin, Mr. Pietrzyk have both been interviewed. Those 302s have been supplied to Mr. Gibson covering various interviews. Again, I am indicating any loss of memory, there has not been any showing the memory cannot be refreshed from the interviews. Certainly there are no alibi witnesses that have been named, although argued in the brief, and finally, if there is a loss of memory, if anything, it would be in benefit of the defendant as oppose to the government.

THE COURT: No notice of alibi filed?

MR. MACKENZIE: No. With respect to the perjury case, the materiality issue, the government has met its burden under the 6th Circuit law, whether it assisted or influenced the grand jury.

With respect to the perjury, the documents regarding to investors' monies, Mr. Gibson dropped that argument.

With respect to the $189,000 check, it is true that I prefaced my remarks that it is an unrelated subject or different subject, but not unrelated to what the grand jury was concerned with, the fraudulent activities of Mr. Manuel, and when the FBI agent was reviewing Sterling Savings Bank records for Independent Mortgage Corporation, he came across a check from Oakland Title Company in the amount of $189,000 signed by Mr. Smith. In interviewing Mr. Smith prior to the testimony in front of the grand jury, he said that's my signature, but --

THE COURT: I signed it before.

MR. MACKENZIE: He couldn't offer an explanation and we, the government, was looking at Mr. Manuel, where did he get that check forge with

Mr. Smith's signature? Did he steal it? Deposit it? Did he commit bank fraud, and that was the nature of the inquiry regarding that check. It was within the scope of the investigation of Mr. Manuel which Mr. Smith was testifying for.

With respect to aiding and betting the bank fraud, we cited the case law regarding that. The United States, when it supersedes --

THE COURT: On Page -- not page -- but Footnote 4, talks about the court to strike as surplusage.

MR. MACKENZIE: Yes.

THE COURT: Wait until I get a new indictment, and Mr. Gibson gets new a indictment as well. If he wishes to make further written argument for anything pursuant to the motions, I will hear them. There may not be, but I will give that privilege because that's a new charging paper.

MR. MACKENZIE: We indicate to the Court that we are planning to present evidence that there was a quote, "risk of loss," upon the deposit of the $189,000 check by Mr. Manuel. Regardless of that, I still think it was a scheme to defraud a financial institution.

You have the context of a title company working with a mortgage company that's done substantial business in the past, and the deposit of that company check would relate or disclose nothing more than normal course of business between the two businesses. That occurred in the past, and merely continuing, and once deposited, it may be a bad attempt. Maybe it is a safeguard that the bank imposed to prevent it from a loss, or if -- even if Mr. Geissbuhler presented the check, which he did not, it

is still an attempt to commit bank fraud. It is not like the cases cited by counsel. You don't hand someone a bad check on his own account in attempting to make it into a federal matter.

Other than that, I think we have covered all the arguments.

I would indicate to the Court the materiality issue is something that I read, the Supreme Court case and 6th Circuit that follows it. I tried to research this issue, but it appears when talking about materiality now, even though this is perjury or false declaration in front of the grand jury, that is an issue before the jury, and unless the Court has other insight into that, that's how I plan --

THE COURT: That's what Jake Baker from the 6th Circuit does in terms of judges stepping in on these type of things.

MR. MACKENZIE: If the Court took the opportunity and wants to look at that, I would welcome the Court's assistance. When you look at the prior case law on perjury, the cases are clear the materiality is an issue before the Court, and Supreme Court is saying that materiality is a question for the jury and not for the Court, and now I am attempting to revise our instructions to conform with that case law.

McGhee is not a perjury case, although it makes the statement when materiality is an element of the offense, that's before the jury and oppose to the Court.

THE COURT: Thank you.

Mr. Gibson, what documents are not available?

MR. GIBSON. The $189,000 that is at issue,

and Mr. MacKenzie --

THE COURT: Is not available?

MR. GIBSON: The check is not available, and I do not know where it is, or can give the Court any indication of where it is, or where the copy that the government has came from.

MR. MACKENZIE: Might I try to shed some light?

THE COURT: Sure.

MR. MACKENZIE: The copy that we have, your Honor, was a copy that was discovered from Henry Manuel's Sterling Savings Bank corporate account, Independent Mortgage. That's a copy of that check, and corresponding depositing tickets. We didn't have a copy from First of America. I don't know what happened to the original. It might have gone to Mr. Manuel since he deposited it in Sterling Savings. We requested that Mr. Manuel try to find out if there is an original, but we don't have the original, nor the bank has the original of that, or if it went back to Mr. Smith's Oakland Title Company.

When we talked about that, Mr. Smith indicated that the company had been sold, and he was not receiving the bank statements going to the old address. We did ask the successor owner if he ever received the check, and his response was in the negative.

THE COURT: Thank you. So there's a copy of the check?

MR. GIBSON: There is a copy of a check that apparently forms the basis of one of the charges against Mr. Smith. The problem that arises with that check, and maybe it is a factual issue, but when the bank processes any draft, any check, anything that

goes through the institution, there is bar coding, coding of some nature both on the front and back. On this check which we have, it is void of any bank markings at all, and it is interesting to note that of all of the documents that the United States of America has against Thomas Smith, that's the only one that is not original or original signature, original anything. It is copy of -- maybe a copy of a copy of a copy of a copy.

The point is, I can't get it. I can't get it from the institution from which that check was written and had to pass through in order to get to another institution for a loss or risk of loss. It doesn't exist. I can't get it, and the government has indicated that that is all they have.

MR. MACKENZIE: But what the defense counsel does have is the account history from the First of America showing that the check didn't clear.

THE COURT: Do you have that?

MR. GIBSON: I have, your Honor. I will indicate to the Court that Mr. MacKenzie has been gracious enough to provide me that, if he has it in the file relating to this, and I have looked at other documents that I asked for copies for. Whether because I am a defense attorney or not, I don't trust a lot of people, especially the United States government in criminal matters. When I rely upon documents that they provide, I want to get them, and I want the information from the horse's mouth as oppose -- I got it from the government, and I am suppose to tell the my client Mr. Smith, I got it from the government. You can trust them. I can't do that, your Honor.

THE COURT: I understand. Let me ask you

another question in terms of witnesses.

The principal witnesses are Mr. Pietrzyk, and I presume Mr. Manuel is a witness, is that correct?

MR. MACKENZIE: That's correct.

THE COURT: And there's one other individual as well who's involved in this?

MR. GIBSON: Mr. Pietrzyk, Mr. Conklin, Mr. Jim Smith.

THE COURT: Right. Any sense of memory loss on either of them or in the either -- there's three or four -- in terms -- other than the fact that it has been awhile?

MR. GIBSON: It is very hard to prove a negative. It is hard for me say Mr. Conklin, you remember so and so.

THE COURT: Understand.

MR. GIBSON: That's a subjective decision.

THE COURT: I understand.

THE COURT: Anything that you wish to respond, Mr. MacKenzie on that?

MR. MACKENZIE: No, your Honor. No, your Honor.

THE COURT: Anything further?

MR. GIBSON. No.

THE COURT: What we will do, after the superseding indictment comes out, then Mr. MacKenzie will send you a copy. Then figure like 10 days from the day you get it, you will let us know either whether you have any response, any supplemental to the matter, and send a copy to Mr. MacKenzie. If yes, then send a copy. If no, send a note, and copy Mr. MacKenzie that you have nothing that you wish to add to your arguments and your brief with the motion, and the Court will get to work

and render an opinion.

MR. GIBSON: Excuse me. With regard to the superseding indictment, would that include additional charges?

THE COURT: I think his brief indicates that it had one charge.

MR. MACKENZIE: I am adding the wire charge. I talked to Mr. Gibson about the potential additional charges. I indicated to Mr. Gibson that again, I am not positive where that will go. If I did, that he would be notified firsthand.

I want to indicate to the Court, so we are all clear, the Court's current trial date is set for the 17th.

THE COURT: That will not happen. We will not with the superseding and a response to that.

MR. MACKENZIE: I just wanted to indicate that to the Court.

THE COURT: The motion stops.

MR. MACKENZIE: Just so you understand, I believe Mr. Gibson's position as well as my position, if just wire fraud is added, if the Court wishes, we could be prepared to go to trial on the 17th.

THE COURT: But the problem is that I will not be allowing Mr. Gibson time to respond before I decide this motion. So superseding will be the 9th, and you have 10 days to decide if there is further response to that. We will push back the trial date, and a new trial date probably will be in October.

How long do you expect the trial to run, basically four counts if we go to trial?

MR. MACKENZIE: I was thinking that it might take a week.

THE COURT: A lot of paper?

MR. MACKENZIE: I've got to bring in the fingerprint person and handwriting person, and that takes time, and Mr. Manuel's testimony with tape recordings. That will --

THE COURT: A little cross-examination on that too.

MR. MACKENZIE. Right.

THE COURT: I know. We will go from 8:30 to 1.

Mr. Gibson?

MR. GIBSON: Just for the Court's information in scheduling this matter in October or a later time, your Honor, I have a criminal trial scheduled now to start in Oakland Circuit, the Jenny Jones matter.

THE COURT: I thought Mr. Burdick was handling that?

MR. GIBSON: He is my co-counsel. I brought him in. Right now it is scheduled for October 7th. We filed an appeal last week. I don't know what will happen.

THE COURT: We will not force you to do two at once. It will be amenable. The motion is under advisement, freeze it under speedy trial alert.

MR. GIBSON. Another matter relating to this, Mr. MacKenzie on behalf of the government has indicated that maybe there is something else out there. Could we --

THE COURT: I don't want to get involved. If that is plea bargaining, you talk to Mr. MacKenzie.

MR. GIBSON: I don't know if there is any plea bargaining when it is set for trial. That's what we are facing, or are we looking at something right after that in the interim?

THE COURT: I don't know, and I can't ask

you. You are in a better position than I am. Mr. MacKenzie is a very fair prosecutor and a very good person, and I don't expect anything untoward. You can talk with him, if he will say something. If he won't, I can't force him to say it, and you can't either.

MR. MACKENZIE: Again, we are trying to go back to your desires in the matters, but from the government's perspective, if we were to add an unrelated charge, which I talked to you about, what the nature of government is not going to oppose a reasonable delay for him to prepare. At this point I am not saying that we will bring that --

THE COURT: It is best for the two of you to communicate with each other.

MR. GIBSON: We have, and Mr. MacKenzie has more than gracious in that regard.

THE COURT: Thank you, counsel.

MR. GIBSON. Thank you, sir.

(Proceedings concluded.)

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CERTIFICATE OF COURT REPORTER

I certify that the foregoing is a correct transcript of recorded proceedings in the above-entitled matter.

"s/Ronald A. DiBartolomeo, CSR
Official Court Reporter
(313) 962-1234

March 24, 1999

Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	Criminal Case No. 94-81126 Detroit, Michigan November 20, 1996
-vs-	)	
THOMAS MARK SMITH, Defendant	)	

TRANSCRIPT OF MOTION
BEFORE THE HONORABLE PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: ROSS I. MACKENZIE, ESQ.
Assistant U.S. Atty.

For the Defendant: FRED L. GIBSON, ESQ.

Court Reporter: Ronald A. DiBartolomeo, CSR
740 U.S. Courthouse
Detroit, Michigan 48226
(313) 962-1234

Wednesday, November 20, 1996

THE CLERK: United States versus Thomas Mark Smith, 94-81126.

THE COURT: Okay. Mr. Gibson is here for Mr. Smith. Mr. Smith is also present, and Mr. MacKenzie is here for the government.

The purpose of this hearing is to argue the issue of --

I believe of the second superseding indictment in addition to the charge on wire fraud and another issue.

Why don't you proceed, Mr. Gibson.

MR. GIBSON: Thank you, your Honor.

Your Honor, I know that the Court has had the opportunity of not only receive, but to review the briefs submitted.

Your Honor, I want to emphasize that there are two issues before the Court with regard to the indictment and the superseding indictment issue against one Mark Thomas Smith.

THE COURT: On the second superseding indictment?

MR. GIBSON: That's correct, your Honor. As the Court is well aware, the government has added a fourth count, some five years after the initial event, and many years after the original complaint was issued against Thomas Mark Smith.

There are two issues for decision: Number one, having to do with the bank fraud statute, whether it was intended to cover the particular events as alleged against Smith by the government; in other words, does it come under the federal

jurisdiction or would it be a state law issue; and matter number two, having to do with the wire fraud, the added count in the superseding indictment. Should that, as a matter of law, be excluded due to the applicable statute of limitations?

Let me start in the reverse order, starting with the limitation issue. As the Court knows and judicial notice of the fact that there is both a five year and 10 year statute of limitation. The five year applies to non-financial institution affected entities, and the 10 years applies specifically to financial institutions. Both of these issues are tied together in the sense that the government alleges a number of things against Mr. Smith, the gist of which is and revolves the issuant of checks.

The information provided by the government and to this Court confirms that the focus of -- assuming for the sake of argument -- that everything that the government says is true that the focus of the fraud, if any, by Mr. Manuel and Mr. Smith, was not a bank, was not a financial institution but in fact, it was an individual, and both -- again, assuming for sake of argument in this motion everything by this government be true -- both Mr. Smith and Mr. Manuel are sophisticated business people, had a number of years of experience in the mortgage arena, financial arena and all documents related to both.

Mr. Manuel issued checks allegedly signed by Mr. Smith to another individual, allegedly to pay off a debt. The government now says as a result of that, as a result of utilizing those transactions and out of state banks, you are now guilty of fraud. You are guilty of fraud involving a financial institution, and your focus was not the individual to whom you issued

the check. The focus was the intermediary, the financial institution that you were trying to defraud when, in fact, that was not the case.

Ultimately, it may be an issue of fact at this point. I don't think the government has submitted sufficient information to this Court to get it to the jury based upon that issue alone, based upon what has been presented to the Court, an individual that was the focus.

Getting to the statute of limitations, if, in fact, there is no financial institution involved as alleged by the government, and, in fact, the Court believes the focus or intent to was to defraud an individual, we don't have a financial institution. Therefore, the 10 years statute of limitations doesn't apply. The five year applies, and it is brought beyond the statute of limitations and expands upon the focus of original indictment.

As the Court is aware, and it has been cited in my memorandum, the focus -- excuse me -- the statute of limitations applies -- again, assuming the Court believes it is not a financial institution -- the statute of limitations would apply if the added count expands, and is essentially separate and distinct from the original indictment, and therefore, there are other things that the government must do to substantiate the added charge.

Do they relate to the same individuals? Yes.

Do they relate back to an event back in 1991? Yes, but they were not the original focus of the grand jury investigation.

That count, as the Court is well aware, was added recently. Again, it is a number of years in excess of five years of the original event.

Your Honor, I would rely upon that, and rely upon the arguments that were submitted to the Court in writing as a basis for request of relief.

THE COURT: Thank you.

Mr. MacKenzie?

MR. MACKENZIE: Well, your Honor, with respect to the statute of limitations argument -- first of all, I apologize for being late.

THE COURT: Apologize to Mr. Gibson. I was working. He was sitting.

MR. MACKENZIE: With respect to the added count of the wire fraud, I attempted to outline the basic facts in the reply brief, but essentially, what we got doesn't have to be a wire fraud.

Let's just say it is a telephone call or a wire communication between private parties. What we have here is a scheme to defraud that was integrally associated with Citibank Chicago. The investor, particularly Mr. Joe Pietrzyk, it was represented to him that monies had to go to that account, the Independent Mortgage account by Mr. Manuel to show the overseas investors of the assets that could qualify for the larger loan.

The account was opened shortly, about a month and half before the monies were wired transferred. Then based on Mr. Smith's representation to Joe Pietrzyk and Charles Conklin, Mr. Pietrzyk wired the money to the Citibank account. From there, those monies were wired back to the Independent Mortgage Company account at Sterling Savings Bank in Michigan and dissipated quickly.

In addition to that, as part of the side agreement that Mr. Smith had with Mr. Manuel, and

other investors were unaware, Mr. Manuel provided two checks dated a couple of weeks after the agreement had been signed, post-dated a couple of weeks after the agreement was signed for security for repayment of the investors' money. Those checks were written on the same account. Those checks then did not clear when they were deposited because the monies had been dissipated, and then finally with respect to the scheme itself, Mr. Smith played the roll of a Citibank Chicago banker to help convince the foreign investors.

It is not a matter of where it is a very remote transfer that does not involve financial institution. The case law -- it appears--there does not seem to be a great wealth of case law defining this term. It does seem to indicate -- well, first of all, one thing that is certain, the bank has to be the object of the defrauding, and there is language indicating that language similar to the affecting interstate commerce. Thus, there is the applicability of the 10 year statute of limitations.

THE COURT: This didn't in any way affect the bank funds, or did it?

MR. MACKENZIE: Citibank Chicago did not suffer a loss other than --

THE COURT: What happens when a check -- in other words, the bank ultimately rejected two checks?

MR. MACKENZIE: Right.

THE COURT: When you do that, it did get into the bank system. It was not saying, I have a friend at Citibank. The money was put in the account.

MR. MACKENZIE: First there was the wire

transferred from the Michigan bank to Citibank Chicago in April of 1991. It was 50,000 wired to that account. Mr. Manuel caused it to be wired back to Sterling Bank in Michigan where it was put in the Independent Mortgage Company account and spent.

THE COURT: Right.

MR. MACKENZIE: Then later, when Mr. Smith being pressed by his fellow investors for this money back and trying to get satisfaction from Manuel, he turned to Mr. Conklin. There were two checks that Manuel had given him, and then they deposited those checks and returned NSF.

THE COURT: And deposited in the Citibank.

MR. MACKENZIE: Cashed up here and then ultimately presented.

THE COURT: Drawn on Citibank Chicago.

MR. MACKENZIE: Right, and they bounced. Whether that bank actually suffered a technical loss or administrative expenses, I am not sure.

THE COURT: That affects the bank even if they didn't suffer?

MR. MACKENZIE: I think the way that language is to be construed broadly, and it doesn't mean the bank has to be the object of the fraud. It comes under that affecting financial institution.

Then the other argument with respect to the fraud statute, the defense tried to make this as a bad check case, and it isn't. What you got here is a check that Mr. Smith gave to Mr. Manuel, and it is important to understand the circumstances here. He gives him a check drawn on a dormant account of his company, which is the first for the Oakland Title Company. He gives him a blank check that is signed by him, and Mr. Manuel takes that, makes it payable

to his mortgage company, Independent Mortgage Company. He fills it out for $189,000 and deposits it in his Independent Mortgage Company account at Sterling Savings Bank.

What you have here is a normal course of conduct between two related companies, the title company, which is typically the disbursement company for closings on mortgages to a mortgage company, the proceeds of the sale. That's how it looks.

Then you have that inflated balance on the Independent Mortgage Company account of $189,000, which then Manuel uses to try to pay off a debt that he has with Geissbuhler, and makes a check out for 189,000. Geissbuhler does not cash the check because of the past history of Manuel, and knows better, but nevertheless, Manuel completed the act of attempted bank fraud once he has taken this Oakland Title check, which Mr. Smith knows is not going to be covered. If they are caught, both have a nice excuse for each other. Henry Manuel says, I thought I got the check in good faith from Oakland Title and Oakland Title, as Mr. Smith did before the grand jury, says, I don't know how he got it. I don't know how he got the check.

So in this case, it is just not simply a bad case where Mr. Smith takes his own check, writes a bad check and gives it to somebody and it is presented on his account and it doesn't clear. You got this scheme to make it look as if it is a way to get Mr. Manuel's corporate balance up, which is check kiting, and under the case law, that has been cited by the government, it is bank fraud. We did eliminate in the second superseding indictment, eliminate the second

subparagraph to make it clear. We are going under the first paragraph.

With regard to the instructions that we are talking about, it is attempt to defraud a financial institution, not an attempt to obtain monies under the control and custody of a financial institution by means of false pretenses and et cetera. There is a line of case law that merely presenting a check is not false pretenses or false representations.

I think honestly, under circuit law, we could have proceeded under that, but to eliminate the confusion, and go with the one theory, which is applicable in the case so the jury won't be confused and won't have questions as to which paragraph they are deciding in their verdict, I eliminated it.

THE COURT: Did you want to respond?

MR. GIBSON: May I, your Honor?

THE COURT: Sure.

MR. GIBSON: Your Honor, we hear this term "scheme" from the government quite a bit, and it seems to be a popular phrase. If we toss that in, and eventually it will work its way in, scheme, scheme, scheme, conspiracy, scheme, eventually something will stick.

Your Honor, the checks in the financial institution, yes, they are of the same mold or same -- out of the same bowl, but again, they -- that was the intermediary, and the government would like us to believe because we flow through there, we took a hop through there, trying to defraud an individual, that Mr. Smith intended to defraud this bank. This is just not the case.

With regard to the check for a large sum of money, $189,000 which was deposited, both of the

gentlemen are sophisticated business persons. Mr. Manuel deposited that check, waited a sufficient period of time knowing full well the bank would not pay the funds, and then issued another check out of that account. The bank rejected it and knowing that, and ultimately, the check was never tendered that had been written to the third party. Never tendered to that bank to try to pull the money out.

Again, the focus --the focus of this whole intent is to defraud the scheme. If anything, if it existed it was an individual. There was an attempt to buy additional by using the bank, but not to draw monies from the bank, your Honor. The case seems easy on its face --

THE COURT: No.

MR. GIBSON: -- but the case is not by any means easy.

This is a document case because ultimately I think when the Court hears the opening statements, we will hear from both sides that really you can't believe any of your witnesses, the defense or prosecution. None of them are credible. It is a document case, and what's going to make it interesting, your Honor, is that the documents are not even clear, but what we do know, that which we have to rely on for purposes of this motion, which the government has given us the basis which to bring the charges, we do know that that's in black and white.

Your Honor, again, I rely on the issues. The statute eliminates one count, and that simply it is a bad check case, and it eliminates the other counts.

THE COURT: Thank you.

The Court has before it the defendant's motion with regard to Count 4 of the bank fraud, as to

whether or not there is sufficient evidence to allow the case to go to trial on Count 4, and the Court finds that at the present stage, taking the government's assertion and allegations, which it must at this time, there is sufficient to take the matter to trial.

As to what the government proves, of course, at trial, the Court will determine whether the government's proofs when they rest -- whether or not it has sufficient evidence at that time, but based on the allegation in the indictment, the Court finds it cannot dismiss the Count 4 charge of bank fraud, aiding and abetting.

With regard to Count 2 of the second superseding indictment, which is a first time broad count, the issue of statute of limitations, it is a very close issue, and there is not a lot of law on the issue. Obviously, the count charges that the wire fraud occurred in April or May of 91, and the superseding indictment was brought in September 1996, which is more than five years later. Congress passed a statute that allowed the amendment, 18 U.S.C. Section 1343. The term statute of limitations expands it from five years to 10 for offenses affecting a financial institution, and the big question is whether, the fact that the offense may have involved a bank, but was not something where the bank or the victim was defrauded allows the count, because certainly wire fraud could be brought without the bank's involvement. The fraud count involves a lot of non-bank situations, but in this case there is a five year limitation, and here it is expanded to 10 if it affects the bank under 18 U.S.C. Section 3293.

After reading the statute, and looking at U.S. versus Lopez, Supreme Court 115 US 1624, 1995

case, which interpreted the commerce clause as the question of interstate commerce relating to guns a thousand feet of a school, and the Court in that case said at that time, the issue of interstate commerce deals substantially affecting. That's how they interpreted it.

Here the statute does not use the term substantially affecting. The statute is using the term affect a bank. The statute also doesn't require the financial institution to be the object of fraud as the 3rd Circuit points to, U.S. versus Pelullo, 964 F.2d 193 at 216, a 3rd Circuit case of 1992.

Also, there is the Legislative House Report 101-54-(I), which talks about -- it says as to the penalty provision of wire fraud offense, it talks about wire fraud offenses involving a financial institution, and that is not what we are talking about.

What we are talking about here is involving affecting, and in this case the fact that, indeed, the checks were drawn on this institution, the Court finds that is sufficient, even though the institution didn't lose money and was not the victim or intended victim to defraud; that it does, in this case, affect a financial institution.

Therefore, the 10 year statute of limitations does apply, and the Court will allow that count to go to trial as well.

So we are set. We will pick a jury on Tuesday, December 3rd and start at 8:30 in the morning. Not nine but, 8:30. After we pick the jury, the case will not begin until the following Monday, which is 9th, and probably throughout the day for that week to deal with this case.

I have received jury instructions from the

government with regard to them, the Court indicated that it would not give the nature of the offense charged instruction, and also the question of whether the Court -- the defendant does or does not want -- the issue of whether or not he testifies, and you will determine that as we get closer to trial.

If the defense has additional instructions, get that to the Court within the next 10 days.

MR. GIBSON: Thank you.

MR. MACKENZIE: Your Honor, just a quick question on picking the jury, do you expect opening to be given that day?

THE COURT: No.

MR. MACKENZIE: On the 9th?

THE COURT: Yes.

THE COURT: All right.

(Proceedings concluded.}

CERTIFICATE OF COURT REPORTER

I certify that the foregoing is a correct transcript of recorded proceedings in the above-entitled matter.6

Ronald A. DiBartolomeo,
Official Court Reporter
(313) 962-1234

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	Criminal Case No. 94-81126 Detroit, Michigan September 15, 1997
-vs-	)	
THOMAS MARK SMITH , Defendant.	)	

TRANSCRIPT OF SENTENCE
BEFORE THE HONORABLE PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government :	ROSS I. MACKENZIE, ESQ . Assistant U.S. Attorney
For the Defendant:	STEVEN REINA, ESQ.
Court Reporter:	Ronald A. DiBartolomeo, CSR 740 U.S. Courthouse Detroit, Michigan 48226 (313) 962-1234

Detroit, Michigan
Monday, September 15, 1997

THE CLERK: Case Number 94-81126, Defendant Number 1, USA versus Thomas M. Smith.

THE COURT: Would the parties please identify themselves for the record?

MR. MACKENZIE: Good afternoon.

THE COURT: For the government?

MR. MACKENZIE: For the record, Ross MacKenzie, Assistant U.S. Attorney on behalf of the United States in this matter.

THE COURT: And seated with you at counsel table apart from the probation officer?

MR. MACKENZIE: Special Agent Richard Salomon of the Federal Bureau of Investigation.

THE COURT: And for the defendant?

MR. REINA: Good afternoon. Steve Reina on behalf of the defendant.

THE COURT: Seated with you at counsel table is who?

MR. REINA: The defendant, Thomas Smith.

THE COURT: Okay. At this time, if you and Mr. Smith and Mr. MacKenzie would please go to the lectern, there are a couple of preliminary questions, and then we will proceed with regard to the hearing.

First of all, Mr. Reina, did you receive a copy of Pre-sentence Investigation Report? I know you did because I got the thing, but I have to ask the question.

MR. REINA: We acknowledge receipt.

THE COURT: And did you have a chance to go over it, sir?

MR. REINA: We did, your Honor.

THE COURT: And did you go over it with Mr. Smith?

MR. REINA: We did, your Honor.

THE COURT: At this time do you have any corrections or additions that you wish to make to the Pre-sentence Report?

MR. REINA: With reference to the Pre-sentence Report, yes, and we would incorporate by offering statements contained in the defendant's memorandum, and we would also like to amplify the record.

THE COURT: Let me first deal with that.

The Court does have attached to its copy of the Pre-sentence Report a memorandum from your objections to the
Pre-sentence Report?

MR. REINA: That's correct.

THE COURT: That was submitted by yourself. It is not dated, but it goes up to Item 92, and so I do have that, and I also have the United States objections, just for the record, to the Pre-sentence Investigation Report, which was filed on May 2nd, I believe, of this year, and then in addition to that, let me put on the record, I have received letters on behalf of Mr. Smith.

I received a letter from Mr. Lynn Allen, Register of Deeds, which is also signed by the Deputy Clerk, Mr. William Caddell and Chief Deputy Register Suzanne Payne, another letter signed by Mr. Charles Dill, James Smith, Mr. Smith's father, Gregory Smith, Alvin Crosby and Charles Pike Conklin, a letter from Claude Trim, another separate letter from Gregory Smith, a letter from Gerald

Dahlka of Flagstar Bank, another letter from Charles Dill, some additional letters from Mr. James Smith, and a letter from Mr. Joe Pietrzyk.

MR. REINA: Thank you, your Honor.

THE COURT: Now let me check if there is anything in addition to put on the record with regard to this.

I also have -- and I guess it is an United States sentencing memorandum which was filed on September 4th of this year, and also I have a motion to dismiss charges that was filed by Mr. Reina on September 8th of this year.

MR. REINA: For purposes of today's proceedings, we acknowledge the notice and proceed toward the sentencing hearing.

THE COURT: The motion itself, there was not a motion for new trial in this case. I don't know if Mr. MacKenzie intends to respond to it with regard to the matter, the one aspect. If you don't intend to proceed with it now, you can take it up on a motion for appeal in the matter of an appeal. You can put it on the record at this time.

MR. REINA: Your Honor, we would acknowledge that it is part of the Court's record, and we are not pursuing that motion by virtue of today's proceedings.

THE COURT: Okay.

MR. MACKENZIE: If I may interject, the government does not care to take the time to file a response to this motion unless requested by the Court. The motion is clearly untimely. It would have to have been filed in the pre-trial stage under Rule 12, or if you consider a motion for a new trial, it was untimely since it would have to have been filed seven

days after discharge of the jury.

Also, I would point out that a number of issues raised in this motion to dismiss were raised by previously counsel timely, the motion to dismiss the indictment, and I ask the Court to deny this motion.

THE COURT: Well, in the sense the defendant is not going forward with the motion at this time, the Court will note that it has a for motion for a new trial and a motion to dismiss the charges under Rule 12, which would have to be filed in advance of the trial.

The Court would also point out for the record the case cited by defense, U.S. versus Quasi, 779 F.2d 346, 6th Circuit, dealt with false statement to the INS, and also the dismissal of the indictment, with false material declarations on two counts, to that extent that will go on record, and then Mr. Reina can deal with it at such time as he wishes to appeal or whatever.

Let me then proceed next to, since I asked Mr. Reina on behalf of Mr. Smith if you wanted to go over any particular points with regard to the Pre-sentence Report, and then the Court will deal with them.

You may proceed. Mr. Smith, if you want to sit down or stand up, if you want to bring a chair up closer, whatever you want to do.

Mr. Reina?

MR. REINA: There is one point that we intent to adduce testimony.

THE COURT: Pull the microphone closer to you. Mr. DiBartolomeo has to hear it.

MR. REINA: Thank you, your Honor.

At one point we intend to adduce testimony as to the Probation Department's request to enhance

sentencing based upon the transaction involving Mr. Conklin, Mr. Pike and Mr. Smith.

We are of the opinion that if the Court is going to essentially add an enhance sentencing on that basis, you have to do so based on the preponderance of the evidence by way of an offer of proof. So I would assert that the testimony that I intend to produce from those individuals would be probative whether such preponderance exists.

THE COURT: This deals basically with Count 2?

MR. REINA: That's correct. It is my understanding the people's position is that they believe that although there was an acquittal of Count 2, the enhancement of sentence is something that is warranted based on material that was part of the res gestae of that charge, and we are of the opinion that even if the res gestae of the charges are examined on its own merits, it didn't rise to the level of preponderance that is sufficient to warrant an enhancement for purposes of sentencing.

THE COURT: Okay. Let me just hear from Mr. MacKenzie, and then proceed to recall Mr. Reina.

MR. MACKENZIE: Your Honor --

THE COURT: Based on your sentencing memoranda and objections in the Pre-sentence Report, you not only include that transaction, but you want to include the Franco and the additional transaction as part of the amount involved in this matter, but Mr. Reina's issue relates to that transaction which was the essence of Count 2, if we exclude that, the amount of money that we are talking about becomes -- what would that be?

MR. MACKENZIE: Three hundred some odd thousand dollars, the Manufacturer Bank was 195,000, plus the 189,000 from the attempted bank fraud which several --

THE COURT: Such as Geissbuhler.

MR. MACKENZIE: Right, those two amounts, and then the government was seeking to add to that the $82,000 consisting of Mr. Pietrzyk's, Mr. Conklin's and Mr. James Smith's investments with Mr. Thomas Smith and Mr. Manuel, and then the Franco mortgage loss of $72,000.

THE COURT: Okay.

MR. MACKENZIE: Just essentially, it has been stated both in sentence memorandum and the objections of the prosecution's version, and what we have is a very convoluted series of offenses, but essentially at heart what we have are those four fraudulent schemes that occurred from approximately June of 1990 through May of 1991, that being about 11 months. That should be, or could be considered by this Court as related conduct in that they involve a common accomplice.

THE COURT: Let's start with the Franco one. This one seems -- I mean, I recognize she uses Mr. Manuel as her escrow agent for title and used him for the real estate transaction, but, you know, you tie into that only in the sense that you use Mr. Manuel, and that some of the money relating to that might have gotten intermixed with the other aspect of the case.

MR. MACKENZIE: Yeah. It is not an easy thing to describe the underline factual thing, but the Court may recall some of the evidence that came out in the trial, and Lucy Cohoon testified regarding it,

and one of the interesting things about it, of course, was that Mr. Manuel, who supposedly committed this fraud, begins with Mr. Smith, that being that he, according to Mr. Smith's version, had whited out this check that had been made payable to the underlining mortgage company, put his own company's name on it, put Mr. Smith's initials by that to look as if Mr. Smith had initialed it, and then had used that to defraud this underline mortgage company out of it.

Now the point being that, number one, of course, you have, again, this episode with Mr. Manuel, a common accomplice, the two of them using a respective basis to conduct the fraud, the same modus operandi to make it look legitimate, and Manuel involving Smith, took fellow investors' money in the overseas deal, and took them to Henry Manuel, someone that he claims had cheated him, and the criminal prosecution and referral of that matter, this concept, is one other element or added level to his interfering with this investigation, and trying to sidetrack the government on it.

Now also, that offense, although committed in June of 1990, it continued, and by the supplemental pleadings, his testimony under oath at the September 10, 1991 hearing is that two months before being interviewed by Agent Salomon for the first time, he is testifying about these things, and what does he do? It is the same kind of thing that he does in the creditor's examination for Manufacturer, and the grand jury comes in, reads through that thing. What a mess. This whole thing, this whole series of checks. He is the title agent for it. He is not there for the closing. There are three checks to

Independent Mortgage Company, and admits under oath that he signed a signed statement which presents this scenario that exonerated Henry Manuel. He's done that to get paid his money, but testifying truthfully under oath.

So we have that whole thing. We have Lucy Cohoon that testified that Smith was there, the check was whited out with his permission. He was there, and that he knew, but this whole thing -- then we move from that to the Manufacturers Bank matter which really starts taking off in 1989 when the fund is created, but starts running into problems in the beginning of 1991.

THE COURT: I have read your memorandum, and I understand what you are saying. I think that while this may be relevant to the ultimate sentencing, that it is not relevant conduct to the -- pursuant to the guidelines in this case. This is a separate transaction, and so accordingly, I will not include the $82,000.

MR. MACKENZIE: Seventy-two.

THE COURT: I am sorry, $72,000. Then that brings us down to the 195,187, which are two more counts of conviction and the question of the 82 relating to the Conklin, Pietrzyk and Smith matter.

MR. MACKENZIE: Let's make sure we are getting this right. The 189 is the attempt bank fraud of Sterling Savings and 195,000 as related to the fraudulent conduct of the Manufacturers Bank escrow fund.

THE COURT: Right.

MR. MACKENZIE: Then government also sought to include the $82,000 from Mr. Smith who solicited from the investors, and that was the count

that the jury acquitted the defendant on with respect to the wire fraud.

THE COURT: Let me look at the guidelines and impact of the 82 on the guidelines before we go further. The guidelines that we are speaking of --

MR. MACKENZIE: Section 2F1.1.

THE COURT: Then it goes -- basically it goes from 350 to 500,000, is that correct, or are we using the old book?

MR. MACKENZIE: I think you are right, your Honor.

THE COURT: The issue of going from over 350, which is what we have from Manufacturers and Geissbuhler, and add the 80, that doesn't put it in another guideline range.

MR. MACKENZIE: That's correct.

THE COURT: Okay. For the purposes of the guideline question, we don't have to get into that, and that doesn't kick him into a higher rank, and I will hear from you, Mr. Reina. I am not done, but I am trying to get an idea where we are going to go with regard to this hearing.

MR. MACKENZIE: Well, you are right. If the Court determines that the 82,000 should not be included as relevant conduct, no.

THE COURT: Even if you include the 82 --

MR. MACKENZIE: It doesn't make a difference, right, other than to the extent that I suppose if something else was knocked out on appeal or something like that.

THE COURT: Right.

MR. MACKENZIE: In that sentence, in a practical sense, it doesn't make a difference in the range that he is falling into.

THE COURT: Right.

MR. MACKENZIE: But I would only point out the government' s position on this is fairly clear testimony of those witnesses of the misrepresentations regarding the solicitation.

THE COURT: That went to Count 2.

MR. MACKENZIE: Those investors had no knowledge of Mr. Manuel's side agreement. Even if you look at Mr. Smith's version of the events from his perspective, those investors did not know that Mr. Manuel supposedly cheated Mr. Smith once before and had a criminal complaint against him, and Mr. Smith himself said they did not know that he had the side agreement promissory note.

THE COURT: Running a longer period.

MR. MACKENZIE: They did not know of the very serious problems with the Manufacturers Bank escrow account which he was quite heavy.

THE COURT: Right.

MR. MACKENZIE: And they did not know about his role in this overseas investment with the exception to Mr. Conklin. He became aware that he played this role.

THE COURT: I will hear from you relating to this when we get to the ultimate sentencing itself, but in terms of the guideline factors, I don't think this is something that the Court has to make a determination of in terms of relevant conduct as far as having an impact on the guideline range that we are speaking of.

MR. MACKENZIE: I believe the Court is correct in that regard.

THE COURT: Let me hear from Mr. Reina on that in the sense that the issue does not have an

impact on the guideline range that we are speaking of. We do not have to get into that particular transaction because the Court will not add that to the amount of loss as part of the relevant conduct which would have kicked Mr. Smith up into a higher category in the guidelines.

MR. REINA: Well, I don't want to make it anymore difficult, your Honor.

THE COURT: Please proceed.

MR. REINA: I would say by way of summary of the argument -- a couple of arguments that are directed toward the scoring of the 189, because we, in summary, say the guidelines contemplate the actual loss, and you are arguing factual and actual loss as to whether this, as it related to bank fraud charges--

THE COURT: Let me hear you on that, and then I will hear Mr. MacKenzie's response. Why don't you proceed.

MR. REINA: Thank you, your Honor.

THE COURT: Where do you want to start, with Manufacturers?

MR. REINA: I will start with the actual bank fraud, that's the 189,000.

THE COURT: Right.

MR. REINA: As it relates to that charge, your Honor, there was an additional scoring and the additional scoring as it related to the application of factors, 25 2X1.1(b)(1). The way we read the guidelines, we read that particular guideline requiring an actual loss.

In that regard we cite U.S. versus William Wright case, which is located at 60 F.3d 240, 1995 case. We cite also, interestingly enough, the case of United States versus White out of the 7th Circuit,

993 F.2d 147, which says that for the amount of loss, there has to be an actual loss that's required when even computing a base offense level. So in other words, you have to have the actual loss before you even assess the base points.

The people cite the Watkins case, and they cite Watkins which has interesting facts. In the Watkins case, there was $13,000 that was actually defrauded from a bank. However, there was another 40,000 that apparently Ms. Watkins was trying to obtain as the full measure of her fraud.

In this particular case, just -- if you set the crazy facts aside that there was a check dated for a month after the alleged fraud could somehow become the companion check for the purposes of fraud, if you set those crazy facts aside, you still have a situation where the check was not negotiated. There was no actual loss that happened to the banking institution as a result of the transaction; in other words, if there was a restitution order, the restitution order would be zero. There was no money that was actually lost on the part of the bank, and critically for purposes of sentencing, there is no actual benefit to the defendant in the amount of $189,000.

Even if you look from that perspective the quote, unquote, beneficiary of 189,000, it was not the defendant, but yet, some other individual.

The one observation that I had, and it was elaborated on in the closing argument remarks, somebody that was involved in great amount of fraud that this individual was involved in, he did a terrible job of essentially committing the crimes, but it didn't result in any benefits to him.

In any event, for cases that we cite and the

law, we stand for the proposition that the loss as contemplated by the Wright case, and loss contemplated by the White case, which I also cited, and with no loss contemplated, it is an accurate computation of the guideline.

THE COURT: Let me hear from Mr. MacKenzie. Thank you.

MR. MACKENZIE: The government addressed this matter in the sentencing memorandum starting on Pages 3 and 4, and I don't have the benefit of this 7th Circuit case cited by counsel, U.S. versus White, but in the two 6th Circuit cases -- and what we have in this case is that we had an offense, attempted bank fraud. That attempted bank fraud was committed by Henry Manuel against Sterling Savings, aided and abetted by Thomas Smith who was convicted of that, and what we have, if the Court recalls, not only testimony of Mr. Manuel's testimony of Mr. Gary Schlinkert from Sterling Savings Bank, but the tape recording conversations regarding that. We have the scenario of the facts that Mr. Geissbuhler was owed money by Mr. Manuel. Mr. Geissbuhler called Mr. Smith in Mr. Manuel's absence.

THE COURT: And said, I will kill you if I don't get my money .

MR. MACKENZIE: Right, and an Oakland Title Company check is deposited. It is made out payable to Independent Mortgage Corporation, and signed by Thomas Smith, but it was made out by Henry Manuel. That check is deposited in Henry Manuel's account, designated -- denoted as closing so it looks to be the proceeds of a real estate closing paid off by Oakland Title Company, and then we

have then the corresponding check written on the account by Henry Manuel on 6 the Independent Mortgage account, Count 2, to Robert Geissbuhler in the same amount, hands it to Geissbuhler, and when he hands that check to Geissbuhler, he completed the offense. Nothing more he needed to do to complete the offense of attempted bank fraud. Mr. Smith consistently denies it, but the proofs show, and he has been convicted beyond a reasonable doubt that he aided and abetted Mr. Manuel in doing this, providing him with the signed Oakland County Title check.

THE COURT: That's the $189,000 check?

MR. MACKENZIE: Yes. Mr. Smith gives it to him and signed a blank check. Mr. Manuel fills it out, and it is irrelevant that Mr. Smith perhaps doesn't know the correct amount. He knows someone is out there. One indication is that he knows Mr. Geissbuhler.

In any event, he knows what Manuel is going to do with the check, and this, if you recall, is at the time when Oakland Title Company -- he is out of it. He has been long out of that business, and supposedly working with Oakland County as plat engineer, and we went through that scenario of how the checks were out the sequence how nicely that fits from the corporate register when he tore that bottom check out, and handed it to Henry Manuel.

When you have that set of circumstances, all the elements of the offense have been completed, but for the fact that Geissbuhler was smart enough not to negotiate that check. Gary Schlinkert's bank was at a risk of loss from 189, particularly when two real estate related businesses are as if it was a normal

business transaction. That's where the 189 figure of loss comes from aiding and abetting is punishable as a principal, and that's the government's analysis.

THE COURT: As long as you are up here, talk about the 195.

MR. MACKENZIE: In regard to that, your Honor, I believe that -- well, the facts on this in the trial, we introduced into evidence at least two documents relating to that matter. One was the original letter that was in the possession of Henry Manuel. That was Government Exhibit Q6. It was on blank paper. It was -- it was purportedly signed by Henry Manuel, addressed to Oakland Title Company. Mr. Thomas Smith dated it April 22, 1991 or April 21st. I don't recall. I have it with me, but in any event, what happened there is that Mr. Manuel gave that original to the investigating agent, and Mr. Smith used that letter in order to take the heat off from the lawsuit that had been filed by Manufacturers Bank for the missing escrow funds money in March of 1991 and, in fact, the records from that case shows that Mr. Smith's deposition was noticed up for April 22, 1991.

THE COURT: Which count are you pointing this as being relevant conduct?

MR. MACKENZIE: To the fraud. It is motive for the whole scenario.

THE COURT: I understand. When you say "motive" -- in other words, under the guidelines, we have to plug things into categories. The Count 4 itself, the language of the indictment, speaks of the $189,000 Sterling Savings check, right?

MR. MACKENZIE: Right.

THE COURT: But does not speak to the

Manufacturers check?

MR. MACKENZIE: No, but it does relate. It relates to the wire fraud count that he was acquitted on, but it relates to the perjury.

THE COURT: But how do you shoehorn it in to perjury count under the guidelines?

MR. MACKENZIE: Well, I have to go back to the analysis. What we are talking about is two accomplices. Same accomplice. Same modus operandi, and what we have, Thomas Smith, he was found guilty when he perjures himself saying there was no agreement. The agreement -- the credit agreement that was provided to Mr. Manuel is the motive for Mr. Smith giving Mr. Manuel a four page credit agreement. One page is the promissory note allowing Mr. Manuel to use the investors' money. In exchange for that, he gave Smith this letter that Smith took and photocopied, and his fingerprints are on the original which remained, which Mr. Manuel photocopied on Independent Mortgage letterhead and submitted to the Manufacturers Bank attorney. Don't come to me. I got that money. The rest of the money is on account with Henry Manuel, $195,000, and the letter even makes illusion to the Manufacturers Bank as if this is a real legitimate investment of the balance of the fund, and that's talked about in the tape, whereby the credit agreement is there, and then he says, what did I give you, and they talk about the Manufacturers Bank, and he shows him the credit agreement. I have seen this or probably seen this.

It is a motive for that in order to help Smith get out of the jam with Manufacturers Bank, and he lies about that in front of the grand jury. He says

there was no agreement, and he was convicted of that.

THE COURT: Basically, what you are asking the Court to do is to take it into account as relevant conduct as part of Count 1 -- you are asking the Court, is it Count 1 or Count 2? Is it the Citibank matter and Sterling Savings -- let me see. I am just reading it over, which one of the two counts.

MR. MACKENZIE: It would be the first false declaration count.

THE COURT: Count 1.

MR. MACKENZIE: That there was no agreement.

THE COURT: That would be Count 2 is 189,000. It would be then Count 1. You are correct, Count 1.

MR. MACKENZIE: You have the superseding indictment in front of you.

THE COURT: The second superseding indictment.

MR. MACKENZIE: Count 1.

THE COURT: False declaration.

MR. MACKENZIE: That's the count.

THE COURT: That would be the count that would tie it in, and the question then is whether under that provision -- and Ms. Fields and I and you, Mr. Reina, can work together -- that provision under the guideline with regard to1623, false declaration, there is a monetary aspect to that; in other words, in the Pre-sentence Report -- and let me turn to that for a minute -- under the Probation Department's work up sheet of Count 1, which is Page 10, if you have it in front of you, basically that falls into a 12, and then Count 3 falls into a 12, and it is Count 4 that carries

it up to the higher level, is that correct? The Count 4 bank fraud is the one which includes --

MR. MACKENZIE: One hundred eighty-nine thousand, right and I am abandoning in my argument -- I believe Manufacturers is related conduct to that count under the criteria that we set forth in the sentencing memorandum; that is, it is common -- it is a common course of conduct involving the same accomplice and similar modus operandi agreement, two related business companies, like it was with the Geissbuhler matter, and also part of a series of criminal offenses.

THE COURT: Right. It is a different bank. That's one thing.

MR. MACKENZIE: Yes.

THE COURT: And it is different parties relating -- Mr. Geissbuhler was not involved in this one.

MR. MACKENZIE: Right. You don't have the same victim, but you do have the same accomplice and the same modus operandi. This was a legitimate transaction between two realty businesses, and here's the letter to show you that's the case.

THE COURT: I understand. Let me hear from Mr. Reina with regard to this matter, and we are talking about the 195,000.

MR. REINA: Judge, I got a read out of the Manufacturers National versus Tom Smith case from the Oakland County clerk's office, and it is interesting when the prosecutor insists that the letter -- and puts the letter in question mark, coming back over essentially as security to essentially get the heat off of Mr. Smith by the April 22nd or 24th date it was purported, 1991. The date it was written

was a false default judgment. The default judgment had been entered against him on April 12, 1991. So I don't understand what he got out of the virtue of the letter when he was essentially on the -- under default judgment that's relates to that.

Secondly, when I said letter, quotation marks, testimony of Mr. Manuel at trial, he didn't quote, unquote, sign the letter. I don't see how -- how that figures in. Even if we get past all of that, there is still a problem that I have essentially with this particular piece of conduct. I mean, this particular conduct was relating to a different victim. It was conduct that clearly was within the knowledge of the prosecutor. I mean, if the people intend to have this be part of the operative basis of sentencing, certainly it is within their prerogative to place this within the scope of the second superseding indictment, and they went back to the drawing board once.

THE COURT: Well --

MR. REINA: They did in a sense. It was included in Count 2, and that's the count that was acquitted on.

THE COURT: Okay

MR. REINA: That's what I would say as it relates to that. I am addressing specifically the 195.

THE COURT: Right. That's where we are at. The Court has the benefit, and I think -- and correct me if I am -- as going through the reasoning that the government is seeking to introduce this additional $195,000 matter through Count 4, with regard to the guidelines, and that count related to the question of the Sterling Savings Bank check dealing with Mr. Geissbuhler, and that was the count that the jury had convicted the defendant on in addition to Counts

1 and 3 which related to false statements to the grand jury.

Again, while this may be relevant to the ultimate sentencing, the Court does not find that it is relevant conduct with regard to the particular counts of conviction under the guidelines.

So accordingly, what we will be facing then is the Count 4 amount for purposes of the guidelines of $189,000, which would bring the sentence under 2F1.1(b)(1)(H), between 120 and 200,000, which means you add a seven level increase to the base offense level of six rather than a nine level increase to the matter of base level, and therefore, it would bring this down to 17 on the offense level, and one on the criminal history category, which creates a guideline range of 24 to 30 under these calculations.

Before getting into the substance, Ms. Fields, are the calculations correct in terms of the amount?

MS. FIELDS: As you calculated them?

THE COURT: Yes.

MS. FIELDS: Yes.

THE COURT: As I calculated the relevant conduct excluding other matters, does that read out correctly to you, Mr. MacKenzie?

MR. MACKENZIE: Yes.

THE COURT: Not accepting it, but as far as my calculation?

MR. REINA: We agree with the math, Judge.

THE COURT: I understand to that extent, we resolved some of the matters, and will go back to Mr. Reina to other matters that you wish to address relating to the Pre-sentence Report and objections to that.

MR. REINA: Thank you again, your Honor.

Again, by way of a wrap up on this -- just by a wrap up on this, the $189,000 issue at 2X1.1 of the sentencing guidelines themselves provide in certain cases --

THE COURT: Your voice is trailing off. A little slower and louder would help.

MR. REINA: 2X1.1 of the guidelines make an attempt to discuss the issue of intended offense, and in their discussion they speak in terms of successful completion of part, but not all, of the intended offense.

In this case, Watkins is a great example because Watkins illustrates the points what the guidelines mean. What they talk about, a partial successful completion, is in essence an actual defrauding of some money. So we say in a situation where the loss -- we say essentially in this situation the loss -- what the loss means in common is what the actual loss was. So in the sense there was no $189,000 loss, there is no basis for enhancement as a part of the guideline application.

THE COURT: Thank you. Let me hear briefly from Mr. MacKenzie.

MR. MACKENZIE: Well, I attempted to address that before.

THE COURT: You did.

MR. MACKENZIE: What we have is not an attempt. It was interrupted before it was completed. It was an attempted bank fraud that was completed when Henry Manuel gives to Robert Geissbuhler. He did all that he had to do to commit the offense of attempted bank fraud.

The fact that Robert Geissbuhler had the smarts to call the bank and did not present that to

the bank, still the bank was at risk of the loss, and we went through that in a pre-trial motion and through the trial.

Let's say the government raided Henry Manuel's office before he delivered to Robert Geissbuhler. Then we are talking about the circumstances that Mr. Reina pointed out. That's not case here. It was complete. The attempted bank fraud was complete when he delivered the check written on the account at Sterling Savings.

THE COURT: The Court has before it the question with regard to the parameters of sentencing guidelines 2X1.1, attempt guidelines in this case.

This issue was tried to the jury. The jury did return a verdict of guilty. The 6th Circuit decision in U.S. versus Watkins, 994 F.2d 1192, 1993 case and U.S. versus Flowers, 55 F.3d 218, a 1995 case, which was denied, 116 Supreme Court, supports the government's claim that to the extent that the facts in this case were established on the record at trial, and as they were established, there was $189,000 aiding and abetting on the attempt bank fraud in this case, and that is the figure that the Court will utilize for the purpose of the guidelines under the sentence.

Mr. Reina, we are back to you now.

MR. REINA: Thank you, your Honor.

Then that leaves us with my offer of proof and testimony of Mr. Conklin, Pike and Smith.

THE COURT: They had nothing do with the 189. That was Geissbuhler's matter. There was another one?

MR. REINA: That's correct.

THE COURT: No reason for them to testify

because that amount is not being utilized in this matter.

MR. REINA: Thank you, your Honor. Just one moment.

THE COURT: Okay.

MR. REINA: Judge, we are also challenging the two point assessment for more than minimal planning.

THE COURT: Okay. Then why don't you state your argument, and then I will hear from Mr. MacKenzie.

MR. REINA: Thank you, your Honor.

We --

THE COURT: Let me put on the record, that is set forth that would be Paragraph 42, Page 11 of the Pre-sentence Report, Special Offense Characteristics. This offense is more than minimal planning by evidence of repeated acts over time.

Why don't you proceed on that.

MR. REINA: Well, your Honor, as it relates to that point we believe that the -- our version of the evidence at trial is that the check clearly was altered and moved by another party, and we don't see how the mere act of the signing of a check amounts to a situation of more than minimal planning.

THE COURT: Let me just look at the guidelines for a second and ask you a question, Mr. Reina. 1B1.1 states more than minimal planning -- that is Page 12 of the guideline book, and in Commentary Application Note F. More than minimal means more planning than is typical for commission of the offense in a simple form, and also exists if significant affirmative steps were taken to conceal the offense, other than to conduct to which

obstruction of justice applies, and then says, more than minimal planning is deemed present in any case involving repeated acts over a period of time.

In an embezzlement, that would be relevant to here, the commentary says, a single taking accomplished by a false book entry would constitute only minimal planning. On the other hand, creating purchase orders to, and invoices from a dummy corporation for merchandise that was never delivered would constitute more than minimal planning, as would several instances of taking money, each accompanied by false entries.

What you are stating here, Mr. Reina, we have a single incident.

MR. REINA: That's the issue. It is interesting a bank fraud violation too. I mean, even if you accept the people's proof that it is a check-kiting scheme, based on the operation and interplay of two checks -- I mean, essentially, I would respectfully argue to the Court it is the minimal method which one could successfully use of two checks. There is no other way to do it.

THE COURT: Let me hear from Mr. MacKenzie.

MR. MACKENZIE: In this regard, I don't think you can divorce the actions from Mr. Manuel who attempted the bank fraud. He was the primary. He was aided and abetted. There was more than minimal planning. You don't have Mr. Smith taking his only personal check, presenting it to his bank and there is a check bouncing. He is taking a check from Oakland Title Company, a dormant business, which he no longer has anything do with, and signs it.

First of all, you start off with Geissbuhler's

call which involves Smith. Smith knows the problem. He gets in contact with Henry. They have to work out this deal. Then they go to the parking lot. He gives him a blank Oakland Title Company check, which Manuel fills out, making it look as if it is a transaction between two business related companies attempting to inflate the balance on his account, and he writes a corresponding business check from the Independent Mortgage account to Geissbuhler. That is more than minimal.

THE COURT: Look at the language, and I ask you if this is more than minimal planning, typical for the commission of this offense, which would be bank fraud in the simple form.

MR. MACKENZIE: Yes. He is not just taking his personal check and presenting it to the bank. There's your bad check, a bank fraud type of case.

THE COURT: Let me ask a second question. We don't have repeated acts. That's not part of your --

MR. MACKENZIE: You have more than one act to achieve this offense. You don't have two attempted bank fraud offenses, that's true, against Sterling Savings Bank.

THE COURT: We don't have multiple phony items. There was created one phony item that created this check?

MR. MACKENZIE: Two phony items, Oakland Title and Independent Mortgage check.

THE COURT: Okay. And you are saying because of the second check and because it wasn't a personal check, and it was on a dormant account, this is creating --

MR. MACKENZIE: Let's do it this way. Henry

Manuel says to Tom Smith, I need an Oakland Title check. He does that. What good is it to Henry Manuel? Can he sign it to Geissbuhler? No. He checks on Tom Smith. That's who wrote the check.

You have to go through a series of things to make this look right. How does it look right? Take the Oakland Title check, not a personal check. It looks like it is business related in the business of dispersing proceeds to the mortgage company on a closing. Fill it out, says it is a closing, take that, deposit it in your bank account, not Tom Smith's First of America, but Independent Mortgage bank account at Sterling Savings. They look at it, closing proceeds, deposit it in Independent Mortgage account for proceeds of the sale, it inflates the account. Then you take another check, write that out to Robert Geissbuhler with an Independent Mortgage check. How much is in the account? One hundred eighty-nine thousand. Oakland, at a minimum, is buying him time.

It is not a simple little offense whereby he cashes a personal check to give to Henry Manuel because he knows this won't come back right away. You think about that. When it came back to Oakland Title Company eventually, he would be blaming it on Henry Manuel, which he did. Henry Manuel filled it out.

THE COURT: Just a second. I want to pull up the statute that we are talking about, 1344.

MR. MACKENZIE: And your Honor --

THE COURT: Wait. Wait. I am not cutting you off.

Whoever knowingly executes, or attempts to execute a scheme or artifice to obtain any of the

monies --

MR. MACKENZIE: The first one.

THE COURT: Defraud. Whoever knowingly or attempts to execute, a scheme or artifice to defraud a financial institution, and your argument is that this was a scheme to defraud a financial institution, because it involved multiple checks, because it involved multiple entities?

MR. MACKENZIE: Aider and abettor is as punishable as the principal. It is not a simple routine transaction that went through with Gary Schlinkert. This was business account business check. Those are all components that add to this.

THE COURT: Okay. Let me hear from Mr. Reina.

MR. REINA: Judge, I have been listening to the prosecutor' s argument --

THE COURT: Let's not get personal, and just respond.

MR. REINA: I am saying, in terms of the structure of the argument, it is like saying the more complicated the bank robbery, if I have a 12 shooter as oppose to a six shooter. It is definitely when check-kiting occurs.

THE COURT: More like a bank robbery, more minimal planning. Some guy sets up a bomb to go off a few hundred yards from the bank to divert attention, have someone dress in a police outfit. It is more than just give me the money, and what he is saying, it is more than here's the check. He is saying, there were multiple entities used. It was not a personal check. It was a defunct entity, and it was used to balance off another check. That's what he is saying.

MR. REINA: The question restated would be, where, as a matter of law, is there more than minimal planning that deem to existed in a situation where two accounts are used in banks with two different checking instruments to form an alleged check-kiting -- alleged incident check-kiting, and I submit the question answers itself. Two financial instruments are used to buttress -- to produce the fraud irrespective of the source of the checks, irrespective of the means or vehicle of the deposit. The issue remains, the same two checks combined for the check-kiting. I don't understand -- if you look at the structure, it is --I mean, you have to you say there is something inherent in those aspects that would elevate the situation to being more complicated.

I mean, it is -- it is interesting. I actually incorporate a lot of what the prosecutor said by way of our argument. I agree the allegation is that Manuel as the principal was involved in check-kiting. The question is more than minimal planning when only two checks were used.

THE COURT: Thank you. Let me hear from Mr. MacKenzie in response to that. We have two checks used to
balance off --

MR. MACKENZIE: Not just two checks. Not just two personal checks, two realty related businesses.

THE COURT: Two checks from two different businesses.

MR. MACKENZIE: That makes it one notch up from
a simple check-kite or personal check to Henry

Manuel's business account. You have taken it up a notch. You put on there closing, that these are proceedings from real estate. That is one further act of concealment. This looks as if this $189,000, which is another matter that we might bring up, the amount.

That's not so unusual when talking about a real estate transaction, but it is a necessary component to look like it is 189,000 from the proceeds of a real estate transaction. If it had been a personal check or something, 189,000 draws more suspicion.

It is more than minimal planning in that regard of what would go in the completion of that offense.

THE COURT: Thank you.

The Court heard an interesting argument in the sense that the more than minimal planning is not spelled out with a hypothetical that deals with this particular situation.

We do have two checks. We do have the balance of the two checks. We do have two corporate entities rather than personal entities, but the Court does not feel it makes out more than the minimal planning as required under the guidelines .

Accordingly, the Court will delete that from the special offense, and not apply that as special offense characteristics.

MR. MACKENZIE: I ask that the Court reconsider that. The Court is not taking into consideration the call from Geissbuhler.

THE COURT: I understand what you are saying.

MR. MACKENZIE: Also, I have to indicate to

this Court that this is an offense where you can punish the aider and abettor as the principal that was found guilty by a jury beyond a reasonable doubt.

THE COURT: I understand that, and I recognize that, but just in terms of the facts of the offense here, the Court will not reconsider it. The Court will not apply it, and that brings us to the area of -- what area are we at right now? Guidelines. That brings us to you. You have to help me, Ms. Fields.

MS. FIELDS: 15-1, 18 to 24 months.

THE COURT: And that's how you read it out Mr. Reina, 18 to 24, 15-1?

MR. REINA: Can I consult with Ms. Fields?

THE COURT: Sure. Is that how you read 15-1, Mr. MacKenzie?

MR. MACKENZIE: Yes, your Honor.

THE COURT: Thank you. Is this correct?

MR. REINA: Yes. The record should reflect I consulted.

THE COURT: Okay. Is there anything else that you wish to address with regard to the Pre-sentence Report?

MR. REINA: We contest, for purposes of sentencing, the enhancement for obstruction of justice, and our basis for that contest would be that we believe that there has to be something that is material in the defendant's conduct that materially altered the people to obtain what they were looking for with reference to the grand jury proceedings on the 25th of May 1993. They were able to go on and not only to successfully prosecute, but negotiate a plea negotiation with Mr. Manuel as a result of evidence that the people had. We have difficulty

seeing under those facts how essentially the people were at a disadvantage from what they say the actions of the defendant were.

THE COURT: Okay. Mr. MacKenzie?

MR. MACKENZIE: Well, your Honor, we addressed in sentencing memorandum that the obstruction of justice is as in any case --

THE COURT: We are not dealing with any case.

Let's --

MR. MACKENZIE: In this case he lied in front the grand jury, and was making a side deal with Henry Manuel, and, the tape recording goes on that he avoided him, avoided him. I didn't tell him that you stole the check, or you would have been indicted. He was interfering with the administration of the justice, and when he lied before the grand jury, he knew that.

THE COURT: And this relates to the May 25, 1993 appearance, is that correct?

MR. MACKENZIE: That's right, and I addressed that in the brief, starting on Page 2 and carrying over to Page 3 citing the guideline comments.

THE COURT: That is Pages 2 and 3?

MR. MACKENZIE: Right. You have the conviction of the obstruction offense, which is the perjury and the underlying offense, attempted bank fraud. Then you add two points for the obstruction offense.

THE COURT: Okay. Thank you.

Do you wish to respond to that, Mr. Reina?

MR. REINA: Judge, we freely concede that the--

THE COURT: I am sorry?

MR. REINA: We concede that this is a case where Mr. Manuel was not, as it related to the check in question, charged or in the position to be charged with the theft of that particular check.

However, we also humbly submit at all points of the respectful testimony of Mr. Smith, was that simply it was not the case. I mean, with all due respect, Mr. Smith could have been brought forward to testify to, perhaps, many different propositions.

However, our respectful position in this matter is that by testifying to what he maintained was the truth -- I mean, if his version of the truth was a version that substantiated a lesser charge, that's essentially where the proofs were. I mean, if the people at a later point endorsed Mr. Manuel as a witness essentially further down in the prosecution, we can assume essentially they were endorsing portions of the story that Mr. Manuel was advocating, and Mr. Manuel's position -- the people's witness' position himself is that essentially he had not taken the check or stolen the check.

THE COURT: Thank you.

This issue regard to sentencing relates to guideline 3C1.1, obstructing or impeding the administration of justice.

The Court heard the testimony at trial, which included the tape recording by Mr. Manuel of Mr. Smith's statement, and the Court feels that given the testimony at the trial, where the jury did come back with regards to Count 1 and 3 with regard to false declarations before the grand jury, and also any other evidence as well that the Court heard under 3C1.1, particularly Application Note 3(b), relating to

committing perjury, and 3(g), relating to providing materially false statements to a law enforcement officer the significantly obstructed or impeded the official investigation or prosecution of the instant offense, this provision does apply, and so the Court will include the special offense characteristic with regard to obstruction of justice pursuant to 3C1.1.

Mr. Reina, back to you.

MR. REINA: If the Court could give me one moment?

THE COURT: Sure.

MR. REINA: Judge, before we leave the scoring issues per se, I was wondering it the Court would entertain some brief additional argument on the loss, or is the Court of the mind --

THE COURT: The Court ruled on the loss provisions.

MR. REINA: All right. Just one moment.

Judge, by way of summary of the rest, what we intend to produce, I would like to introduce a couple of Mr. Smith's current business partners and business associates by character reference. Mr, Smith has statements that he wants to make, and then go essentially to make a concluding statement to sum up why we believe in view of the statements that we offered in our sentencing material, based on witnesses coming forward, and essentially they received money --

THE COURT: I don't think the government contests that they did receive the money back.

MR. REINA: Why we are essentially arguing for a probationary sentence.

THE COURT: Okay. You may proceed with what you wish to do.

MR. REINA: Thank you very much.

We would call Mr. Johnston first. He is a business associate of Mr. Smith's.

THE COURT: Just have him stand there. Please identify yourself.

MR. JOHNSTON: Michael.

THE COURT: Last name?

MR. JOHNSTON. Johnston.

THE COURT: You may proceed.

MR. JOHNSTON. I have known Tom Smith for six years. I had two business dealings with Tom, both in 1994. I am fully aware of what was transpiring at that point when I entered into the deals. I provided more than $100,000 on both of the deals. Tom provided his expertise in the land development deals. Since, I have sold both projects, and we made money on both of them, and I trust Tom, and I would do another deal with him, Tom, and that's it.

THE COURT: Thank you, sir.

MR. REINA: I would call Mr. Proctor.

THE COURT: Proctor?

MR. REINA: Yes.

THE COURT: Okay. Sir, give your name for the record and spell it.

MR. PROCTOR: Steven Proctor, P-r-o-c-t-o-r.

THE COURT: Thank you.

MR. PROCTOR: I first met Tom 10 years ago, and we had an opportunity to work professionally in business for the last five years, and I found Tom a man of high moral character and responsible, a trustworthy person, and since then, we discussed partnership deals together, and I would enjoy any of that with Tom, and I trust him immensely.

THE COURT: Thank you, Mr. Proctor.

MR. REINA: I would call Mr. Smith, your Honor.

THE COURT: Okay.

THE DEFENDANT. Your Honor, I thank you for the opportunity to speak today. This is the first time I had a chance to talk to you. I want to tell you about myself, tell you about my background, and I want to tell you about the issues that are contained in the Pre-sentence Report that are derogatory, are inaccurate is it relates to me personally, and this should not be consider and for the Court to consider a more favorable sentence for me.

I was brought up by my parents, who are here today, to stress that hard work and education are the avenues to take for a rewarding, satisfying life.

At the age of 12, my father gave me a taste of hard work. He taught me how to. He taught me in a way to begin to choose a profession, as I did in survey. I follow his steps. He got me out at the age of 12. I worked at night with him on the farm planting strawberries, cultivating strawberries. I worked with him on the weekends surveying. He taught me a great deal, and I am so proud of my parents. If it wasn't for them -- my mother, who started working for the schools, and my dad who worked 80 hours a week surveying, on the side raising strawberries, working for the county -- they saved money. Saved money not only for me, but for my two brothers and sister.

We went through life with the basics. We didn't have the new cars, didn't have the new TVs or the VCRs. They worked hard. Both saved money. Both bought saving bonds, and they, on their

salaries, gave us the opportunity to go to college, all of us.

I did go to college. I went to Ferris State. I graduated with a Bachelor of Science in land surveying.

I started a title insurance company at the age 23. I worked hard at it. It was a small business. I worked not only doing that, but I work weekends with my father until 1985 when I too became licensed.

I worked at the title insurance business up to 1990. I also did surveying on the weekends. Like my father did, I tried to provide the best I could for my family.

During that time, 1983 to 1990 when the title insurance business only had four members, my wife, sister-in-law, we didn't have one claim -- not one claim for any title errors from 1983 to 1990. Also, I had never had a claim for any survey work that I had been doing for the last 12 years. Some of it involved surveys of high culpability of getting sued. I had not been sued.

I met Henry Manuel before Franco in 1986 or 1987. I did title insurance before Franco. She was with Real Estate One. I was the only title company outside of this that did title insurance for them because my service was that good.

Henry Manuel impressed me quite a bit. He was smart. He knew prominent people in the Clarkston area. I trusted him. That's the way I was brought up, which leads to the Manufacturers case. I don't want to get into too much detail with that, but some of the points that were not brought up in the Manufacturers case involved not Manufacturers

Bank, but did involve sellers of a piece of property in Waterford Township. It also involved Maxi Health Care Plan, who was the major owner of that property. They trusted me with that property at $500,000. There were several disbursements on that account. Eventually, they told me, hold onto the money for a long period of time.

I invested the money with Henry Manuel -- a portion of the money with Henry Manuel. That money was always known. Its location was known, Maxi Health Care. I provided not just one statement that the prosecution has said was bogus, but provided statements, and also in the civil court case with Manufacturers since 1989, I told them where the money was, who it was that invested, and what kind of interest they were. They were aware of that. They had no complaints with that.

I realize you are not using that today for a guideline point system, but if there is anything that would make your decision derogatory, I want to make it clear, there was no fraud on my part. I was responsible for the money. I was taken by Henry Manuel. He gave me all assurances in the in 1991 when this came up that the money was safe. When I asked for the money, he provided me documentation. He showed assets that he had. He showed me. He needed time to liquidate the assets, and that was at the same time when the overseas loan deal was going on.

I believed him. I believed that at this point he was still an honest guy that would not do what he has done, but I knew that I was responsible for that money. I signed the agreement with the depositors, and I am ultimately responsible to them on a civil

matter.

I have done no criminal acts with regards to money. When it didn't come about, I didn't hire an attorney when they filed a suit against me. Mr. Manuel provided me assurances that this money was liquidating money. He was paying me the money. Obviously, that didn't come about. I didn't hire an attorney to defend that. I was responsible for it and I did receive a judgment. I received a judgment10 days prior to the date of the bogus letter that the prosecution is indicating.

I made a mistake with the money. I should not have given it to Henry Manuel, but there was no criminal intent on my part to do that. It was a poor, poor business decision, but for the prosecution to say the motive of that was the motive of the investors giving the money on the basis of me receiving a letter 10 days after I already had a civil judgment against me -- and the letter was a piecemeal letter, and the letter, as testified by Mr. Manuel -- he says that's not his signature. I find it amazing that happened, and that's the story that the prosecution has believed.

I also want to talk a little bit about the Franco matter. The Franco matter as has been decided today, will not be used for the purposes of enhancing the points. However, the Franco matter, I want to clear up exactly some little things on what happened in some of the things that was behind the outcome of Franco.

The sheriff's department -- I don't know the day -- but the sheriff's department investigated the Franco matter, the Oakland County Sheriff Department. They apparently had a complaint from Beverly Franco against Henry Manuel and myself.

They investigated that. Detective Parker called me in. I provided all the checks involved in that. I testified at a district court hearing that eventually bound Mr. Manuel over for trial.

I later, through another civil action, because that after in November of 1991, I was responsible for Minnesota Title, my underwriting agent, and my agreement was I am responsible for any acts that caused them any loss, and I realized that. So in 1991, I received judgment me for that. Their indication was that I had been such a good, good business relationship with them, no other claims for seven years, that they were not trying to collect money from me through the trial and through the criminal matters. They realized what actually took place. There was some sort of agreement between Beverly Franco and Henry Manuel, false tax returns issued to get the loan to begin with, and that ultimately, they are the ones responsible for the fraud. I, acting as the title agent, was the insurer. They collected money from Beverly Franco. I don't know how much. They later came to me and said, we need $20,000, and that's our loss. That's what they told me. I agreed to pay it. I didn't have the money, but I agreed to sign a mortgage, not only my house, but two other properties to secure and make sure they would get the money back, and I did pay them $20,000 plus interest.

Once again, there was no criminal intent on my part. The Oakland County Sheriff Department investigated that, and reading the testimony of Mr. Salomon, he also investigated that. That was his first dealings with Henry Manuel. I am not sure why Henry Manuel was not charged with anything, but

that's Mr. Salomon's decision, and we have to live with it.

Also with respect to the $82,000 that makes up the other three investors my father, Joe Pietrzyk and Charles Conklin, I realize after today's decision, that will not be used against me, but I would like to stress to the Court that at all times I have assured and agreed to pay Joe Pietrzyk and guaranty his $50,000. Not because I was defrauding Joe Pietrzyk, but because I thought it was a legitimate deal. It sounds crazy for someone to get 100 million dollars, but that's what we believed, and we believed he was going to get 100 million dollars, and we get our money to do the real estate deal. That's why I secured Joe Pietrzyk's money. I thought it was far out, but I did that also; and the government has this. Henry Manuel signed an agreement with Joe Pietrzyk to give him his money back, actually to give him $300,000 at that time. Joe Pietrzyk was only one depositing money on April 21st.

Henry Manuel indicated -- we indicated to Henry Manuel that's all we had was $50,000, and that was wired on the 21st or the 22nd.

It wasn't until later, a week or so later, that Mr. Manuel came back to me, being the con that he is, and he needed more money. He could not raise all the money, and that's when I put my own money in next, and another week or 10 days went by, and he said, you know -- he threw the bait -- we are close. I need more money. That's when I went to my father and Charles Conklin. They -- I told them what they were trying to get, what the loan was, and they invested their money also.

Obviously, we know the end of that story. It

didn't happen. It was a scam.

I should point out from 1991 actually to this day, Henry Manuel lives in a house, has no -- made no payments on it. For six years he has been in bankruptcy court. So we made a decision, the investors. I looked at the Oakland County Circuit Court records. Everybody, and his uncle was suing Henry Manuel.

The bomb dropped in 1991 with Mr. Geissbuhler and the Mr. Doeringer, the dentist. He lost $300,000 and took some self-action against Henry Manuel regarding fraudulent documents; documents purportedly signed by people that were not signed. This was, in essence, 1991, the same time Agent Salomon was investigating Henry Manuel.

It was incredible that Mr. Salomon did not even look at the Oakland County Circuit Court records. He testified in this Court that he did not even go to circuit court to look for any records, but yet, when Mr. Manuel came to him with a three page document that looked very professional and very well made up, and the fourth page didn't flow as Mr. Salomon also testified that it didn't flow. He believed him. He didn't come to me, who I was cooperating with at the time. He believed Henry Manuel, a 14 count felon with a federal investigation being underway. Mr. Manuel had 14 counts pending in Oakland County Circuit Court, but no, he believed him. He believed Mr. Manuel was telling the truth, and we will wire Mr. Manuel, but I need to back up.

My first involvement with Mr. Salomon was in 1991. As he indicated, he came in and wanted to know the story of what was happening, how did we lose our money, and the first question that I asked

Agent Salomon was, did you find out where the money is? Do you know where the money is, not knowing there were other investors losing three million dollars with Mr. Manuel. Mr. Salomon response was to me and later also, was that it was not the FBI's job to act as a collection agency.

We decided because of the circuit court pending, that I have was going to pursue Mr. Manuel to get the money back, and I pursued him for two years, had meetings, called him. As the prosecution pointed out, they submitted a message, and I called Henry. That was my goal, get the money back.

Well, what happened was that Henry decided to give me a mortgage on his house? We -- I checked all the records. I tried to find what he owned, what we could do. I found 10 acres across the street. He offered things for collateral. That was not acceptable. He deeded to associates as later turned out was forgery in the Oakland claims that was forged. He conveyed something, and that's a mess, and I won' t get into that, but anyways -- so I got a mortgage on his house and he provided it to me. The investors we were happy. We were going -- we were trying to work with him, but when push comes to shove, he decided that no, that was not his wife's signature. His wife claimed it was forged, the notary signature, his daughter's, and it wasn't his son-in-law's signature either on the mortgage.

So he filed bankruptcy, and we went to bankruptcy court. I pursued him for three years in bankruptcy court. All along, I had been paying for attorney fees on behalf of the investors. I felt the responsibility. After all, I knew Mr. Manuel, and I spent $25,000 in attorney fees recover something in

bankruptcy proceedings.

Well, the bankruptcy proceedings didn't go real well. There was an agreement made by the parties, and which Mr. Manuel has not lived by yet, but anyways, at that time I, in 1992 -- I think this was actually up until today -- but in 1992, I get another agreement with Joe Pietrzyk. I previously agreed to secured my interest in Mariners Cove, secured $50,000 with my 200, $300,000 value, and in 1992, I went to Joe because he could have it. At that time he took my interest, the 25 percent that I secured. He had the right to do that. I told that I wanted to pursue Mr. Manuel. That was the time we were going in the bankruptcy court, and he agreed to basically to give me an open end repayment.

I went through the bankruptcy proceedings with no money available. I started selling assets. I sold the two properties that Mike Johnston indicated. I had sold the first one. I had chance to sell -- there was another vacant land I had a small lot in White Lake. I paid out of that part to Joe Pietrzyk. I paid him $10,000. I followed up when we closed other transactions. I paid Joe the balance of his 40,000 when I went to the closing. I went to the bank and got the cashier's check. I went out to see him. I think that was one of the more happier times in my life in six years.

I paid Pike Conklin. I paid him his $10,000. I offered my $22,000 my dad lost to him, and he refused. He ultimately knows who is responsible for his payment, and waits for his payment.

Mr. Manuel was ordered through the Court to pay restitution. I think I have more my wallet now than what he has paid in restitution, but what I am

really concern with, your Honor, is really the way I have been treated in this case.

Whether you believe me or not in the case, the jury has decided. They believed three quarters of the prosecution's claim. There is instances where I feel the prosecution has gone over and above what they should have should have been doing. As I mentioned, they didn't check circuit court to find out whether Mr. Manuel had any pending cases. There is at least 30, all in 1991.

For the most part everybody was caught in 1991, but the last thing that just really concerns me is the fact that once I was arrested, I was handcuffed in the Oakland County courthouse and taken away. I could have been called and volunteered an arrest, but that's what they chose, and a week later they come in and illegally play some tapes in front of my boss, stating that something has to be done to him. What can you do, trying to get me fired. I worked hard for Oakland County, although the last three years since this has happened, I can't always say 100 percent of my time has been devoted to my work. Sometimes I stop to think and think about what has transpired, and think this is a dream.

The documents that the people believe and the testimony that Mr. Manuel has given is incredible. For example, Mr. Manuel, when we tried to explain to the Court that the fourth page of that agreement is an agreement in itself, the fourth page of the credit agreement is an agreement that I had with Mr. Manuel to do personal investing with. We provided and showed Mr. Manuel what I purchased from him in 1989 when I thought he was a good guy and had no problems with Mr. Manuel, and lots of

other people did not either, and what I see, I got convicted of making statements on a tape of probably, maybe, but your Honor, my only goal was to meet with Manuel and get our money back. I didn't know the government was setting me to have Mr. Manuel show documents to me that he didn't show.

He showed me the fourth page. That is a valid document in itself. My fingerprints are only on the fourth page. He didn't show me the promissory note that Mr. Salomon provided to Mr. Manuel. The promissory note was not brought up, and the reason it was not brought up was because I would have said, what is this? We have no agreement. What are you talking about, but they clearly trapped me into making a statement of probably, maybe. I would have told them I'd killed John F. Kennedy to keep lip in the car, but I keep talking, and try to get the money back. I thought I was going to be wired. I am going after Mr. Manuel, but that was not the case, and that was their choice.

What really concerns me is the relationship that Henry Manuel has with Agent Salomon, and there just seems to be a connection, and I am not familiar with the relationship of a convicted felon with an FBI agent for two years or so after this case has been settled, but the fact is that his son is playing baseball for him two years into an investigation, and he is driving his son 18 miles round trip, and he says he never had any contact with Mr. Manuel. I don't understand why he could not have his son playing baseball in Rochester Hills where he lives. Why is he going 18 miles round trip to have his son playing on Mr. Manuel's baseball

team in Clarkston? That puzzles me.

It puzzles me that Mr. Salomon never arrested Mr. Henry Manuel after four years of investigating. I don't know what happened when it came to the plea agreement. All I know is that three million dollars is missing.

My father, who has done a hell of a lot of work in this case for me, and I appreciate it very much, was doing work after the trial was over. Unknown to me, he was going through some libraries and obtaining copies of the baseball team. That was the public library. They copied them, and an obstruction of justice charge was filed. I am not sure by who, but I know Agent Salomon called the prosecutor or the detectives handling it, and laid it on as to what my father was doing, obstructing justice, and he called my father to show his displeasure , and my father indicated what he was doing, trying come up with information that would help me. Nothing illegal. He was not contacting Mr. Manuel or contacting any witnesses, but Mr. Salomon's response -- he called me -- I will give you any information. My dad asked him for information, and he would not give it, and I will close with this.

Mr. Salomon was very upset with the fact that I gave public record information over the phone to Henry Manuel, but I, in turn, since the trial has been over, done some public record searching myself, and I find it very incredible to believe -- and I am not making this as a charge or anything -- but I have some real concern with Agent Salomon and Mr. Manuel, due to the fact the money is missing, and Mr. Salomon happened to have his house paid off 45 days after my trial is over.

MR. MACKENZIE: Objection. We can't have this going on. These are aspirations against --

THE COURT: You can respond.

THE DEFENDANT: So your Honor, in closing, I just want to also point out that I have taken a moral, ethical and more importantly to the victims, a financial responsibility to the people who has lost money because of Mr. Manuel's schemes or defrauding of people, and because of the legal situation involving the bankruptcy court and now my court action, I have paid out to people $203,000 to make it right financially with these people, and I hope the Court would take that into consideration on my behalf.

Thank you.

THE COURT: Thank you, Mr. Smith.

Mr. Reina?

MR. REINA: Judge, I will be very brief.

Armed robbery is when someone comes in --

THE COURT: A little louder.

MR. REINA: I apologize. Armed robbery is someone sticks up a bank and walks out with the money. Auto theft, they grab the car and take it. The point that I am making, is that it's the hallmark of the commission of a crime that a criminal walks away with something. This has been the only case that I had where the defendant has essentially walked away with nothing. Not one piece of evidence has been presented through the proceedings to the affect to show that even one penny made its way to Mr. Smith's pockets.

You can look at it in many different perspectives, and I have. You can juggle the numbers a lot, and you can get caught up, but no matter how

much you examine the numbers, you come back to the basic essential facts. When you add that fact to the facts that Mr. Smith has paid off the alleged victims in Count 2, that he actually has made other payments in connection with this case, and when you add to it the fact that in the whole consolation of events, the co-actor involved was himself, and criminally charged both at a state and federal level. It is a situation against the backdrop, which we humbly maintain that a probationary sentence is warranted.

THE COURT: Well, I am a judge that's under the law, and the law has guidelines, and the guidelines are 18 to 24 months. That is what we are looking at right now, and how can you tell me not follow the law under the guidelines?

MR. REINA: We maintain that the -- with all we have taken to the Court's rulings with reference to the law issue, and with all due respect, we maintain that the law issue germane to this case, together with the conduct on the part of the defendant, stands for the proposition under the guidelines that the departure is warranted in the fashion that we described.

THE COURT: Thank you, Mr. Reina.

MR. REINA: Thank you.

THE COURT: Mr. MacKenzie?

MR. MACKENZIE: Your Honor, Mr. Smith has again presented himself as a victim in this case, and he has outright lied to THE COURT:

One of the very easy examples, he indicated that he was not shown the credit agreement, and we heard on that tape as he paged through the credit agreement, and that his fingerprints are only on the

last page. There are other fingerprints on the first three pages, just not identifiable prints.

We went all through that. We went through the tape recordings where he admits that he played the role of a Citibank banker. He was part of the con.

He didn't benefit? What about the $195,000 that he took involving that escrow fund, and I point out to the Court that the escrow fund agreement says that he was to deposit that money in a bearing money market, short term certificate of deposit, and he is telling this Court that Henry Manuel is the one that did wrong because he gave the money to Henry Manuel to invest in some offshore bank, and the Court can take the opportunity to read his deposition testimony on that where he supposedly is giving him the money without anything in writing. He said there is nothing in writing, and talks about the four page credit agreement, and ignores the promissory, and talk about documents that Henry Manuel said that he didn't sign.

What about Mr. Smith, his own experts? He said that he signed the promissory note, the credit agreement, all the agreements. Yet, he is denying that he had anything to do with it, that he didn't take the $103,500 from the fellow investors and allow Henry Manuel to handle it, and I forgot about the credit -- one page promissory note. There is no explanation. Our expert and his expert said, yes, that's his signature, and he permits Henry Manuel to take $103,500, and do what he wants, pays the business expense of Independent Mortgage, and hopefully cons the overseas lender.

He says, I know Henry Manuel of Independent Mortgage, a great operation, and I can get millions of

dollars, and by the way, I will be a Citibank banker name Gleason to help you do that. He says he has no benefit. He has 195,000 from Manufacturers that cannot be explained.

A judgment was entered against him. That complaint is based on fraud. A judgment was entered against him and what does he do in the credit examination? He says, I don't know anything about other bank accounts of Henry Manuel. Well, there was an agreement with Henry Manuel that I was going to invest in mortgages, and suppose to get a five percent return. I told Henry Manuel it was an escrow account. It was in writing. Same thing. Nothing in writing from a guy that cheated on a mortgage deal, that whited out his signature.

If you listen to the tapes and recall them, they were collaborators, and Mr. Smith takes offense at Mr. Salomon's relationship with Mr. Henry Manuel, but doesn't take offense of looking up personal property, or the fire bomb list out which the Court deleted from the tape. That was presented at the trial. This was while supposedly on duty at Oakland County as a plat engineer.

Then we have all of these developments. Soon it is not just the sole contribution of his services. Even as counsel admits in the objections, there is a good. Thousands of dollars that he personally invested, all at the time when there is an outstanding judgment of 200,000 from Manufacturers, 72,000 from the Franco Mortgage, and if you talk to the attorneys and probation department, talk to one of them, they are not happy with Mr. Smith' s payments. Manufacturers Bank got a total of $20,000 on that judgment. Maxi Care

went to bankruptcy, and wouldn't pay the attorney anymore to collect. There are in garnishment from 1991 to 1995 of his wages, and yet, all the developments are going on at the same time, Mariners Cove, Forest Lake, to building homes. Yet, no profit from these were used to pay off the judgments.

Then if you read the proceedings in the Franco mortgage, what does he do with that? He admits that he was behind this scenario to exonerate Henry Manuel of any wrongdoing. As to explaining why he did that, I wanted to get my money back. That's why I signed it. When does he tell the truth?

Then we have in front of the grand jury, no, there was a handshake between he and him, and talks about the payment to Mr. Pietrzyk. That was A4. It was hardly a quit claim deed. That was not recorded, and was not recorded until the agent interviewed him, and it after he was convicted is when he paid Mr. Pietrzyk and Mr. Connelly, after he finally decides to sell properties and get money back to him.

Recall the conversations that were taped recorded. Henry, I avoided Salomon. I avoided him. Why? To sidetrack his investigation.

Why didn't we charge Mr. Manuel with bank fraud? We didn't know how Mr. Manuel got that check. Mr. Smith said, I didn't sign that check. I don't remember that blank check. I don't remember giving him a blank check. How could we explain that Mr. Manuel got it, and find out that he was in cahoots with him, and he talks about that on the tapes, and talks about being Gleason.

He says in the credit exam before on June 24,

1991, that Henry Manuel sent me that letter on Independent Mortgage Corporation letterhead. I got $196,000. That was admitted in trial. This is Exhibit H6 where the bank decides to go after Mr. Manuel because he has the money. We have a copy of that letter attached that is allegedly signed by Mr. Manuel, and it is on the Independent Mortgage Corporation letterhead.

Then we have the original that Mr. Manuel that has Mr. Smith's fingerprints on it. Without the letterhead on it, he took this, xeroxed on this and submitted it to the bank's attorney to get them off the track, go off on Manuel and talk about Manuel. In bankruptcy Smith says, I would have done that too if it didn't cost me. You went to bankruptcy. I would have done that if it didn't cost me.

I don't want to relive the case for the Court. We have been going at it long enough, but Mr. Smith has demonstrated here a pattern of not telling the truth, whether he is under oath, whether questioned by law enforcement people or creditors or by the Court, and for that, your Honor, the government asks that Mr. Smith be given the top of the guidelines, at least the 24 months, fined anywhere up to $40,000, and should pay the cost of imprisonment, and also we ask that his bond be canceled now and surrender immediately.

THE COURT: Thank you.

Mr. Smith and Mr. Reina, please approach the bench for purposes of sentence.

The Court has before it case of the United States versus Thomas Mark Smith. This case went to the jury on a four count indictment, and the jury returned a verdict of guilty on three of the four

counts, and the verdict of not guilty on one of the counts.

The Court, at this hearing this afternoon, has basically set forth the guidelines score based upon the Court's rulings, relating to this transaction and other transactions, and that gives the Court a range of 18 to 24 months as we stand before the Court.

In this matter the Court had the trial go before it, and there was extensive testimony as well as tape recordings. One of the aspects related to the question of the documents, and also the question relating to the count as well that the jury found him not guilty on, but that the defendant indicates that he was Mr. Gleason in the phone calls.

The Court also has before it the testimony of other individuals at the trial, and the testimony relating to the fact that the agreement with the investors on Count 2 was different from the agreement with Mr. Manuel on Count 2.

The Court also has before it other matters relating to Count 4, and also to Counts 1 and 2 concerning this case.

The Court, pursuant to the Sentencing Reform Act of 1984, on Counts 1, 3 and 4, the defendant is hereby committed to the Bureau of Prisons for a period of 21 months on each count to be served concurrently.

Following release of imprisonment, the defendant shall be placed on supervised release for three years on Counts 1 and 3, and five years on Count 4. The term of supervised release shall run concurrently.

In addition, the Court will impose a fine, and that will be in the amount of $10, 000 to be paid

immediately.

The Court will also impose the cost of incarceration and supervised release.

A $50 special assessment fee on each count is imposed for a total of $150, and that too is due immediately.

Conditions of supervised release are as follows:

The defendant is to abide by all the special conditions of supervised release as adopted by the U.S. District Court for the Eastern District of Michigan.

The defendant shall pay any fine and or special assessment that is still owing that is imposed by this judgment as directed by the Court.

The defendant shall not incur new or open additional lines of credit without the approval of the Probation Department unless the defendant is in compliance with the payment schedule.

The defendant shall provide the Probation Department access to any requested financial information.

No need for mandatory drug testing in this case.

The Court will allow him to surrender, and will not revoke bond at this time. The Court does not feel that he will flee. The Court does not feel he is a danger to the community, and so the Court will allow him to surrender when a site has been designated for incarceration.

Mr. Smith, you do have a right to appeal. If you wish to appeal, then you must notify the Court, and it must be filed within 10 days of today's date.

If you wish to appeal and you cannot afford

counsel to represent you on appeal, then counsel would be appointed to represent you without cost on appeal.

Again, that notice must be filed, if you wish appeal, within 10 days of today's date.

Anything further, Mr. MacKenzie?

MR. MACKENZIE: No, nothing further, your Honor.

THE COURT: Anything further, Mr. Reina?

MR. REINA: Not for this record.

THE COURT: Okay. Thank you.

(Proceedings concluded.)

Jury Instructions:

THE COURT: Members of the jury, now it is time for me to instruct you about the law that you must follow in deciding this case. You are the fact finder in this case.

I will start by explaining your duties and the rules that apply in every criminal case.

Then I will explain the elements or parts of the crimes that the defendant is accused of committing.

Then I will explain some rules that you must use in evaluating particular testimony and evidence, and last, I will explain the rules that you must follow during your deliberations in the jury room, and the possible verdicts that you may return.

Please listen very carefully to everything that I say, and you will be given a copy of the instructions as well as a copy of the indictment.

You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine, and nothing that I have said or done during this trial is meant to influence your decision about the facts in any way.

Your second duty is to take the law that I give you, apply it to the facts, and decide if the government has proved the defendant guilty beyond a reasonable doubt. It is my job to instruct you about the law, and you are bound by the oath that you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you before and during the trial, and these instructions.

All of the instructions are important, and you should consider them together as a whole.

The lawyers have talked about the case during the arguments, but what they said is different from what I say. You must follow what I say. What I say about the law controls.

Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or toward the other influence your decision in any way.

As you know, the defendant has pleaded not guilty to the crimes charged in the superseding indictment. The superseding indictment is not any evidence at all of guilt. It is just the formal way that the government tells the defendant what crimes he is accused of committing. It does not raise any suspicion of guilt.

Instead, the defendant starts the trial with a clean slate, with no evidence at all against him, and the law presumes that he is innocent. This presumption of innocence stays with him unless the government presents evidence here in court that overcomes the presumption, and convinces you beyond a reasonable doubt that he is guilty.

This means that the defendant has no obligation to present any evidence at all, or to prove to you in anyway that he is innocent. It is up to the government to prove that he is guilty, and this burden stays on the government from start to finish. You must find the defendant not guilty unless the government convinces you beyond a reasonable doubt that he is guilty of each charge.

The government must prove every element of the crime charged beyond a reasonable doubt. Proof

beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not reasonable doubts. A reasonable doubt is a doubt based on reason and common sense. It may arise from the evidence, the lack of evidence or the nature of the evidence.

Proof beyond a reasonable doubt means proof which is so convincing, that you would not hesitate to rely and act on it in the making the most important decisions in your own lives. If you convinced that the government proved the defendant guilty beyond a reasonable doubt, say so by returning a guilty verdict. If you are not convinced, say so by returning a not guilty verdict.

You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions or anything else that you may have seen or outside the court influence your decision in any way.

The evidence in this case includes only what the witnesses said while testifying under oath, the exhibits that I allowed into evidence, the stipulations that the lawyers agreed to, and the facts that I have judicially noticed, and in this case I have not noticed any judicial facts for you.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence, and my comments and questions are not evidence.

During the trial, I did not let you hear the answers to some of the questions that the lawyers asked. I also ruled that you could not see some of the

exhibits that the lawyers wanted you to see, and sometimes I ordered you to disregard things that you saw or heard, or struck things from the record. You must completely ignore all of these things. Do not even think about them. Do not speculate what a witness might have said or what an exhibit might have shown. These things are not evidence, and you are bound by your oath not to influence your decision in any way.

Make your decision based only on the evidence as I defined it here, and nothing else.

You should use your common sense in weighing the evidence. Consider it in light of your every day experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

Some of you may have heard the terms "direct evidence" and "circumstantial evidence."

Direct evidence is simply evidence like the testimony of an eyewitness which, if you believe it, directly proves a fact. If a witness testifies that he saw it raining outside and you believed him, that is direct evidence that it was raining.

Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

It is your decision to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that

you should give to either one, or say that one is any better than any other evidence. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.

Another part of your job as jurors is to decide how credible or believable each witness was. This is your job and not mine. It is up to you to decide if a witness' testimony was believable, and how much weight you think it deserves. You are free to believe everything that a witness said, or only part of it or none of it at all, but you should act reasonably and carefully in making these decisions.

Let me suggest some things for you to consider in evaluating each witness' testimony.

Ask yourself it the witness was able to clearly see or hear the events. Sometimes even an honest witness may not have been able to see or hear what was happening, and may make a mistake.

Ask yourself how good the witness' memory seemed to be. Did the witness seem able to accurately reflect what happened?

Ask yourself if there was anything else that may have interfered with the witness' ability to perceive or remember the events.

Ask yourself how the witness acted while testifying. Did the witness appear honest, or did the witness appear to be lying?

Ask yourself if the witness had any relationship to the government or the defendant, or anything to gain or lose from the case that might influence the witness' testimony.

Ask yourself if the witness has any bias or prejudice or reason for testifying that might cause a witness to lie or slant the testimony in favor of one

side or the other.

Ask yourself if the witness testified inconsistently while on the witness stand, or if the witness said or did something at any other time that's inconsistent with what the witness said while testifying. If you believe that the witness was inconsistent, ask yourself if this makes a witness' testimony less believable. Sometimes it may. Other times it may not. Consider whether the inconsistency was something important or about some unimportant detail; and ask yourself how believable the witness' testimony was in light of all the other evidence. Was the witness' testimony supported or contradicted by other evidence that you found believable. If you believe that a witness' testimony was contradicted by other evidence, remember that people sometimes forget things, and that even two honest people who witness the same event may not describe it exactly the same way.

These are only some of the things that you may consider in deciding how believable each witness was. You may also consider other things that you think shed some light on the witness' believability. Use your common sense in your every day experience in dealing with other people, and then decide what testimony you believe, and how much weight you think it deserves.

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters at issue in the trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case .

One more point about witnesses. Sometimes jurors wonder if the number of witnesses who testified makes any difference.

Do not make any decisions based only on the number of witnesses who testified. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves. Concentrate on that, not on the number.

There is one more general subject that I want to talk about before I begin explaining the elements of the crimes charged.

The lawyers from both sides objected to some of the things that were said or done during the trial. Don't hold that against either side. The lawyers have the duty to object whenever they think something is not permitted by the rules of evidence.
Those rules are designed to make sure that both sides receive a fair trial, and do not interpret my rulings as any indication how I think the case should be decided. My rules are based on the rules of evidence, not how I feel about the case. Remember that your decision must be based on the evidence that you saw and heard here in court.

That concludes the part of the instructions explaining your duties and the general rules that apply in every criminal case. In a moment, I will explain the elements of the crimes that the defendant is accused of committing, but before I do that, I want to emphasize that the defendant is on trial for the particular crimes charged in the superseding indictment. Your job is limited to deciding whether the government has proven those crimes charged.

Also keep in mind that whether anyone else

should be prosecuted and convicted for this crime is not a proper matter for you to consider. The possible guilt of others is no defense to a criminal charge. Your job is to decide if the government has proved this defendant guilty. Do not let the possible guilt of others influence your decision in any way.

The defendant has been charged with several crimes. The number of charges is no evidence of guilt, should not influence your decision in any way. It is your duty to separately consider the evidence that relates to each charge, and to return a separate verdict for each one. For each charge, you must decide whether the government has presented proof beyond a reasonable doubt that the defendant is guilty of that particular charge.

Your decision on one charge, whether it is guilty or not guilty should not influence your decision on any of the other charges.

Counts 1 and 3 of the superseding indictment charge that on or about the dates specified in the Eastern District of Michigan, the defendant, Thomas Mark Smith, knowingly made false material declarations under oath before a federal grand jury, and that the defendant made the statements alleged in the each count knowing that they were not true.

Section 1623(a) of Title 18 of the United States Code provides in part that, quote:

"Whoever under oath in any proceeding before any court or grand jury of the United States knowingly makes any false material declaration, shall be guilty of an offense against the United States," close quote.

In order to sustain the burden of proof for the crime of making false declarations before a federal

grand as charged in Counts 1 and 3 of the superseding indictment, the government must prove the following three essential elements beyond a reasonable doubt:

One, the defendant gave testimony under oath in any proceeding before a federal grand jury.

Two, the defendant made the false material statements as detailed in the indictment during the testimony, and three, the defendant knew that the statement was false when he gave the testimony.

The parties have stipulated that Thomas Mark Smith gave testimony under oath on May 25, 1993 before Federal Grand Jury Number 93-2, and that the transcript of this testimony introduced into evidence is accurate.

The false declarations must be material. False declarations before a grand jury are material within the meaning of the statute if a truthful statement might have assisted or influenced the grand jury. The fact that the statement may not have succeeded in leading the grand jury astray is irrelevant.

Count 2 of the superseding indictment charges that on or about April and May 1991, in the Eastern district of Michigan, the defendant, Thomas Mark Smith, and Henry Manuel knowingly devised a scheme to defraud and to obtain money from Joe Pietrzyk and Charles Conklin by means of false and fraudulent pretenses, representations and promises, and thereafter use a wire communication facility in interstate commerce in order to, in some fashion, advance or further the scheme to defraud and to obtain the money by means of false or fraudulent pretenses, representations and promises.

The government, therefore, assumes the

responsibility of proving each of the essential elements of the crime of using a wire communication facility in interstate commerce to further a scheme to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises as charged in Count 2 of the indictment beyond a reasonable doubt.

Section 1343 of Title 18 of United States Code provides in part that:

"Whoever, having devised or intending to devise any scheme to defraud, or for obtaining money by means of fraudulent pretenses, representations or promises, and transmits or cause to be transmitted by means of a wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice shall be guilty of an offense against the United States."

In order to sustain the burden of proof for the crime of using a wire communication in interstate commerce to further a scheme to defraud and to obtain money by means of false and fraudulent pretenses, representation and promises as charged in Count 2 of the indictment, the government must prove the following three essential elements beyond a reasonable doubt:

One, the defendant, Tom Mark Smith, knowingly devised or knowingly participated in the scheme to defraud and obtain money by means of false or fraudulent pretenses, representations or promises as detailed in the Count 2 of the indictment.

Two, the defendant, Thomas Mark Smith, did so with the intent to defraud; and three, in

advancing or furthering or carrying out the scheme to defraud and to obtain money by false or fraudulent pretenses, representations or promised, the defendant caused a transmission of writing, signal or sound of some kind of means of a wire, radio or television communication in interstate commerce.

Transmits by means of wire, radio or television communication in interstate, commerce defined.

The phrase "transmits by means of wire, radio communication in interstate commerce" means to send from one state to another by means of telephone or telegraph lines or by means of radio or television.

The phrase "transmit by means of wire, radio or communication in interstate commerce" includes conversation by a person in one state to a person in another state.

The use of wire, radio or television communication facility in interstate commerce is an essential element of the offense of wire fraud as charged in Count 2 of the indictment. The government need not prove that the defendant actually used a wire communication in interstate commerce or that the defendant even intended that anything be transmitted in interstate commerce by means of a wire, or television communication to further, or to advance, or to carry out the scheme to defraud or to obtain money by false or fraudulent pretenses, representations or promises.

The government must prove beyond a reasonable doubt, however, that a transmission by a wire, radio or television communication facility in interstate commerce was, in fact, used in some

manner to further, or obtain -- I am sorry -- further or to advance, or to carry out the scheme to defraud and to obtain money by means of false or fraudulent pretenses, representations or promises.

The government must also prove that the use of the wire, radio or television communication in interstate commerce would follow in the ordinary course of business or events or that the use of the wire, radio or television communication facility in interstate commerce by someone was reasonably foreseeable.

It is not necessary for the government to prove that the information transmitted by means of wire, radio or television communication in interstate commerce itself was false or fraudulent or contained any false or fraudulent pretense, representation or promise, or contained any request for money or thing of value.

The government must prove -- must prove beyond a reasonable doubt, however, that the use of the wire, radio or television communication in interstate commerce furthered or advanced or carried out in some way the scheme to defraud and to obtain money or property by means of false or fraudulent pretenses, representations or promises.

Any scheme or artifice to defraud and false or fraudulent pretenses, representations or promises, define these terms.

The phrase "any scheme to defraud or obtaining money" means any deliberate plan of action or course of conduct by which someone intends to deceive or to cheat another or by which someone intends to deprive another of something of value.

The term "false or fraudulent pretenses, representations or promises" means a statement or an assertion which concerns a material or important fact or a material or important aspect of the matter in question, and that was either known to be untrue at the time it was made or used, or that was made or used with reckless indifference as to whether it was, in fact, true or false, and made or used with intent to defraud. A material fact is a fact that would be of importance to a reasonable person in making a decision about a particular matter or transaction.

The term false or fraudulent pretenses, representations or promises includes actual, direct false statements as well as half-truths and includes the knowing concealment of facts that are material or important to the matter in question and that were made or used with the intent to defraud.

A "scheme or artifice to defraud" includes a scheme to deprive another person of tangible as well as intangible property rights. Intangible property rights means anything valued or considered to be a source of wealth.

It is not necessary for the government to prove that the defendant was actually successful in defrauding anyone or successful in obtaining money by means of false or fraudulent pretenses, representations or promises.

It is not necessary for the government to prove that anyone lost money or property as a result of the scheme or plant to defraud or obtain money or property by means of false or fraudulent pretenses, representations or promises.

An unsuccessful scheme to defraud or to obtain by means of false or fraudulent pretenses,

representations or promises is as illegal as a scheme or plan that is ultimately successful.

Count 4 of the superseding indictment charges that from on or about May 8, 1991 to on or about May 14, 1991, in the Eastern District of Michigan, the defendant, Thomas Mark Smith, knowingly aided and abetted Henry Manuel in attempting to execute a scheme to defraud a financial institution; that is, Sterling Savings Bank.

The defendant, Thomas Mark Smith, has entered a plea of not guilty to this allegation in the indictment, as well to all others.

The government, therefore, assumes the responsibility of proving each of the essential elements of the crime of attempting to execute a scheme to defraud a financial institution as charged in Count 4 of the superseding indictment.

Count 4 of the superseding indictment charges the defendant with aiding and abetting Henry Manuel in attempting to execute the scheme to defraud a financial institution.

For you to find the defendant guilty of attempted bank fraud, it is not necessary for you to find that he personally committed the crime himself. You may also find him guilty if he intentionally helped someone else to commit the crime. A person who does this is called an aider and abettor, but for you to find the defendant guilty of attempted bank fraud as an aider and abettor, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

First, that the crime of attempted bank fraud was committed.

Second, that the defendant helped to commit

the crime; and third, that the defendant intended to help commit the crime.

Proof that the defendant may have known about the crime, even if he was there when it was committed, is not enough to find him guilty. You can consider this in deciding whether the government has proved that he was an aider and abettor, but without more it is not enough.

What the government must prove is that the defendant did something to help the crime with the intent that the crime be committed.

If you are convinced that the government has proved all the elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you cannot find the defendant guilty of the attempted bank fraud as an aider and abettor.

Section 1344 of title 18 of U.S. Code provides in part that, quote:

"Whoever knowingly executes or attempts to execute a scheme to defraud a financial institution, shall be guilty of the offense against the United States," close quote.

In order to sustain the burden of proof for knowingly attempting to execute a scheme to defraud a financial institution as charged in Count 3 of the indictment, the government must prove the following three essential elements beyond a reasonable doubt:

One, the defendant, Thomas Mark Smith, knowingly aided and abetted Henry Manuel in attempting to execute a scheme to defraud the Sterling Savings Bank as detailed in Count 3 of the superseding -- counsel I believe that should be Count 4.

MR. MACKENZIE: Yes.

THE COURT: Let me start that instruction over again.

In order to sustain its burden of proof for the crime of knowingly attempting to execute a scheme to defraud a financial institution as charged in Count 4 of the indictment, the government must prove the following three essential elements beyond a reasonable doubt:

One, the defendant, Tom Mark Smith, knowingly aided and abetted Henry Manuel in attempting to execute a scheme to defraud the Sterling Savings Bank as detailed in Count 4 of the superseding indictment.

Two, the defendant, Thomas Mark Smith, did so with the intent to aid and abet Henry Manuel in his attempt to defraud the Sterling Savings Bank; and three, the Sterling Savings Bank was a financial institution as defined by the statute.

The parties have stipulated that the Sterling Savings Bank is a financial institution as defined by statute.

Although the evidence in this case has made reference to other banks and accounts at those banks, the Sterling Savings Bank is the only financial institution which is the subject of Count 4 of the superseding indictment.

The phrase "any scheme to defraud" means any course of conduct by which someone intends to deceive or to cheat another or by which someone intends to deprive another of something of value.

A " scheme to defraud" includes a scheme to deprive another person of tangible as well as intangible property rights. Intangible property rights

means anything valued or considered to be a source of wealth, including, for example, the right to honest services and the right to decide how one's money is spent.

It is not necessary for the government to prove that the defendant and Henry Manuel were actually successful in defrauding anyone. It is not necessary for the government to prove that anyone lost any money or property as a result of the scheme to defraud.

An unsuccessful scheme to defraud is as illegal as a scheme or plan that's ultimately successful.

To act with "intent to defraud" means to knowingly and with the intention or the purpose to deceive or to cheat.

An intent to defraud is accompanied, ordinarily, by a desire or a purpose to bring about some gain or benefit to oneself or some other person or by a desire or a purpose to cause some loss to some person.

Next, I want to explain something about proving a defendant's state of mind.

Ordinarily, there is no way that a defendant's state of mind can be proved directly, because no one can read another person's mind and tell what that person is thinking, but a defendant's state of mind can be proven indirectly from the surrounding circumstances. This includes things like what the defendant said, what the defendant did, how the defendant acted, and any other acts and circumstances in evidence that show what was in the defendant's mind.

You may also consider the natural and probable results of any acts that the defendant

knowingly did, and it is reasonable to conclude that the defendant intended those relates. This, of course, is all for you to decide.

Next, I want to explain something about proving defendant's knowledge.

No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the defendant deliberately ignored a high probability that Henry Manuel would use Oakland Title Company Check Number 5690 that the defendant is alleged to have signed and delivered to Henry Manuel, in an attempt to defraud the Sterling Savings Bank, then you may find that he knew that Henry Manuel would do so, but to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of high probability that Henry Manuel would use that check in this manner, and that the defendant deliberately closed his eyes to what was obvious. Carelessness or negligence or foolishness on his part is not the same as knowledge, and is not enough to convict. This, of course, is for you to decide.

This concludes the part of my instructions explaining the elements of the crime. Next, I will explain some rules that you must use in considering some of the testimony and evidence.

A defendant has an absolute right not to testify. The fact that he did not testify cannot be considered by you in any way. Do not even discuss this in your deliberations.

Remember it is up to the government to prove the defendant guilty beyond a reasonable doubt. It is not up to the defendant to prove that he is innocent.

You have seen some charts and blow ups of

fingerprints and handwriting exemplars. That's their only purpose, to help explain the evidence. They are not themselves evidence or proof of any facts.

It has been brought out that an attorney or his representative has talked with a witness. An attorney or his representative may properly talk with the witness for the purpose of learning what the witness knows about the case and what testimony he or she will give.

You heard some tape recordings that were received in evidence, and you were given some written transcripts of the tapes.

Again, keep in mind that the transcripts are not evidence. They were given to you only as a guide to help you follow what was being said. The tapes themselves are not evidence. If you noticed any differences between what you heard on the tape and what you read in the transcripts, you must rely on what you heard, not what you read, and if you could not hear certain parts of the tapes, you must ignore the transcripts as far as those parts are concerned.

You heard some tape recordings of telephone conversations recorded by one party without the knowledge or consent of the other party. I am instructing you that it is not illegal for one party to tape record a telephone conversation with another party without knowledge or consent of the other party, and you are not to consider this in your deliberations.

That concludes the part of the instructions explaining the rules for considering some of the testimony and evidence. Now let me finish up by explaining some things your deliberations in the jury room, and your possible verdicts.

The first thing that you should do in the jury room is choose someone to be your foreperson. This person will help to guide your discussions, and will speak for you here in court.

Once you start deliberating, do not talk to the jury officer or to me or anyone else except each other about the case. If you have any questions or messages, you must write them down on a piece of paper, sign them, and give them to the jury officer. The jury officer will be either Mr. McMahon or Ms. Parker. There is a buzzer in the jury room. If you have a question or any need to communicate, buzz the buzzer, and someone will come. The officer will give any question or message to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take me some time to get back to you. Any questions or messages normally should be sent to me through your foreperson.

If you want to see any of the exhibits that were admitted in evidence, you may send me a message, and those exhibits will be provided to you.

One more thing about messages. Do not ever write down or tell anyone how you stand on your votes. For example, do not write down or tell anyone that you are split six to six or eight to four or whatever your vote happens to be. That should stay secret until you are finished.

Remember that you must make your decision based only on the evidence that you saw and heard here in court. Do not try to gather any information about the case on your own while you are deliberating.

For example, do not conduct any experiments

inside or outside the jury room, don't bring any books like a dictionary or anything else like that to help you with the deliberations, do not conduct any independent research, reading or investigation about the case, or visit any of the places that were mentioned during the trial.

Make your decision based only on the evidence that you saw and heard here in court.

Your verdict, whether it is guilty or not on each count must be unanimous.

To find the defendant guilty, every one of you must agree that the government has overcome the presumption of innocence with evidence that proves his guilt beyond a reasonable doubt.

To find him not guilty, every one of you must agree that the government failed to convince you beyond a reasonable doubt.

Either way, guilty or not guilty, your verdict must be unanimous.

Now that all the evidence is in and the arguments are completed, and once you go in the jury room, and once I tell you to begin your deliberations -- you won't begin your deliberations until a minute or two after you go back -- once you get that signal, you are free to talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence and make every reasonable effort that you can to reach unanimous verdict. Talk with each other, listen carefully and respectfully to each other's view, and keep an open mind as you listen to what your fellow jurors have to say. Try your best to work out your differences. Do not hesitate to change your mind when if you are convinced that other jurors are right and that your

original position was wrong, but don't ever change your mind just because other jurors see it differently, or just to get the case over with. In the end, your vote must be exactly that, your own vote. It is important for you to reach unanimous agreement, but only if you do so honestly and in good conscience.

No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. So you should all feel free to speak your minds.

Listen carefully to what other jurors have to say and then decide for yourself if the defendant has proved the defendant guilty beyond reasonable doubt.

Let me discuss -- ask the parties for a second, I think there is a typo with regard to Page 45. Let me ask the jurors to go in the jury room for just a minute.

(Jurors excused at 12:15 p.m.)

THE COURT: I have the government's original requested charge. Let me look. It is the back part. I don't know where this came from.

MR. MACKENZIE: Your Honor, do you have the 6th Circuit Pattern Instructions handy at all.

THE COURT: No. It says --

MR. MACKENZIE: 8.04 is the one that should be read.

THE COURT: 8.04. I read through number four.

MR. MACKENZIE: Do you have the pattern jury instruction in front of you?

THE COURT: No. Let me get it from Judge

Freidman's.

(Recess taken.)

(Proceedings resumed.)

THE COURT: 8.04. I have completed 8.04. The question, what is next? I don't know where this came from.

MR. MACKENZIE: I don't either.

THE COURT: And it is not in 8.04. Get rid of Pages 46 and 47.

MR. GIBSON: No objection.

MR. MACKENZIE: I apologize.

THE COURT: That's okay. This goes back to Judge Freidman.

THE COURT: I am taking it out of the court reporter's copy.

MR. MACKENZIE: Your Honor, I would like to point out that one prior instruction that you happened to read --

THE COURT: Let me finish. Did I read something wrong?

MR. MACKENZIE: Yes. You read that the defendant had the proof beyond a reasonable doubt.

THE COURT: I certainly want to change that. It was just a quick I wrote it I will state that the defendant has no duty to prove anything.

MR. MACKENZIE: Okay.

THE COURT: Bring them in, please.

(Proceedings held with jury at 12:20 p.m.}

THE COURT: Sorry for the interruption.

Sometimes the computer spits out more things than you need to be spit out.

What we are doing, is going from Page 45 to Page 48. You are not missing anything. Just some pages that do not belong there. Let me just repeat one point. The defendant has no burden to prove anything at all in this case, to present any evidence at all.

Now going back to the instruction, if you decide that the government has proved the defendant guilty, then it will be my job to decide what the appropriate punishment should be.

Deciding what the punishment should be is my job, not yours. It would violate your oaths as jurors to even consider the possible punishment in deciding your verdict.

Your job is to look at the evidence and decide if the government has proved the defendant guilty beyond a reasonable doubt.

I have prepared a verdict form to record your verdict. The form reads as follows:

As to Count 1 of the superseding indictment, we the jury unanimous find the defendant, Thomas Mark Smith not guilty with a space or guilty and a space.

As to Count 2 of the superseding indictment, we the jury unanimously find the defendant, Thomas Mark Smith not guilty and a space or guilty and a space.

As to Count 3 of the superseding indictment, we the jury unanimously find the defendant, Thomas Mark Smith, guilty, space or guilty, space.

As to Count 4 of the superseding indictment, we the jury unanimously find the defendant Thomas

Mark Smith not guilty, space or guilty, space, and then there is a space with foreperson, and foreperson will sign it there.

If you decide that the government has proved the charge against the defendant beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form.
If you decide that the government has not proved the charge against him beyond a reasonable doubt, say so by having the foreperson mark the appropriate place on the form. Your foreperson -- After you have dealt with all four charges, the foreperson should then sign the form, put a date on it and return to me by ringing the buzzer. Someone will come and get the note from you.

Remember that the defendant is only on trial for the particular crimes charged in the superseding indictment. Your job is limited to decide whether the government has proved the crimes charged.

Also remember that whether anyone else should be prosecuted and convicted for this crime is not a proper matter for you to consider. The possible guilt of others is no defense to a criminal charge. Your job is to decide if the government has proved this defendant guilty. Do not let the possible guilt of others influence your decision in any way.

Let me finish up by repeating something that I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way. You decide for yourselves if the government has proved the defendant guilty beyond a reasonable doubt.

What we will do, we will break for lunch now, and then when you return, you will return onto the

5th floor where you returned yesterday, and we will break now. Why don't you return at quarter to two, and then you will be brought down here. What I am going to do, because our jury room is smaller, Judge Hood's has large windows and is more convenient. When Ms. Parker brings you down at quarter to two, you will be taken to Judge Hood's jury room. So when you go to lunch, if you any belongings or whatever, leave them there, and Ms. Parker will pick them up and bring them in that jury room.

(Deputy clerk sworn in by Court.)

THE COURT: At this point, members of the jury, you will go to lunch, and then you will return upstairs say at 20 of, and Ms. Parker will bring you down here at quarter to.

Everyone rise, and do not discuss this matter at all.

(Jurors excused at 12:25 p.m.)

NO. _____

In The
Supreme Court of The United States
October Term 1998

_____♦_____

THOMAS MARK SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

Petition For A Writ Of Certiorari
From The United States Court of
Appeals For The Sixth Circuit

_____♦_____

PETITION FOR WRIT OF CERTIORARI

_____♦_____

APPENDIX B

Thomas Mark Smith
7559 Olde Sturbridge
Clarkston, MI 48348
(248) 625-3276

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TRIAL TESTIMONY OF RICHARD SALOMON AND ROBERT GEISSBUHLER

CONCERNING THE $189,000 CHECK

MACKENZIE AND SALOMON

(44) Assistant United States Attorney Ross I. MacKenzie (MACKENZIE): Now turning your attention to approximately November of 1991, were you aware of another allegation of fraud regarding Henry Manuel?

(44) Special Agent Richard Salomon of the Federal Bureau of Investigation (SALOMON): Yes.

(45) MACKENZIE: When was this about?

(45) SALOMON: This is a police report forwarded to me by the White Lake Police Department concerning Mr. Joseph Pietrzyk and a NSF, non-sufficient check that he was given from Mr. Manuel.

(73) MACKENZIE: From your review of the Citibank account for Independent Mortgage, did you discover other bank accounts for Independent Mortgage?

(73) SALOMON: Yes, I did.

(73) MACKENZIE: Did you serve a subpoena to the Sterling Savings Bank for the records of that Independent Mortgage Corporation account?

(73) SALOMON: Yes.

(73) MACKENZIE: When was that approximately?

(73) SALOMON: From looking at the March time frame, getting the subpoena was back somewhere in April or May.

(73) MACKENZIE: When you say March time, you're referring to what year?
(73) SALOMON: 1991 -- no, 1992.
(73) MACKENZIE: You had interviewed Mr. Pietrzyk and Mr. Conklin and Mr. Smith in November of '91, is that correct?
(74) SALOMON: That's correct. That was March following that.
(80) MACKENZIE: And did you discover during the review of the Sterling Savings Bank account records another document that involved Henry Manuel and Thomas Smith?
(81) SALOMON: Yes, I did.
(81) MACKENZIE: And what was that document?
(81) SALOMON: It was a $189,000 check from the Oakland Title Company issued by Oakland Title Company, and on May 9, 1991, a deposit slip depositing it in the Sterling Savings Bank account of the Independent Mortgage Corporation.
(82) MACKENZIE: Date of that check?
(82) SALOMON: Check is dated May 8, 1991.
(82) MACKENZIE: And made payable to what entity?
(82) SALOMON: Independent Mortgage.
(82) MACKENZIE: And the sum of the check?
(82) SALOMON: $189,000.
(83) MACKENZIE: In the explanation, what is that?
(83) SALOMON: Closing.
(83) MACKENZIE: What is at the top of the document?
(83) SALOMON: That's a Sterling Savings Bank deposit receipt.
(83) MACKENZIE: What does that indicate?

(83) SALOMON: That shows for the account number across the bottom that the $189,000 was presented for deposit on May 9, 1991.
(83) MACKENZIE: And these documents indicate that this Oakland Title check for $189,000 was deposited in the Sterling Savings Bank account for Independent Mortgage?
(83) SALOMON: Yes.
(83) MACKENZIE: May 9, 1991?
(83) SALOMON: That's correct.
(84) MACKENZIE: And does that document indicate what happened with this $189,000 check?
(84) SALOMON: Yes it does.
(84) MACKENZIE: And what did happen?
(84) SALOMON: The check was deposited on May 9th and deposited and credited to the account on May 9, 1991, and the deposit was returned on May 14, 1991. The number of the $189,000 check was number 5690.
(84) MACKENZIE: Did you obtain records from First of America Bank for the Oakland Title Company?
(85) SALOMON: Yes I did.
(85) MACKENZIE: And referring to you -- well, with respect to that account, were you able to determine whether the account itself was open at this time in '91?
(85) SALOMON: The Oakland Title Company account was opened. Specifically, the one check, the $189,000 check that was drawn was open during that time period.
(85) MACKENZIE: And do you recall what the balance was or approximately what the balance was at the time that the check was presented?

(85) SALOMON: It would have been under $1,000.
(92) MACKENZIE: Turning your attention to the latter part of 1993, did you conduct any other interviews regarding Mr. Manuel's activities?
(92) SALOMON: Yes.
(92) MACKENZIE: Who did that include?
(93) SALOMON: Mr. John Geissbuhler, known as Robert Geissbuhler.
(93) MACKENZIE: What was your understanding of Mr. Geissbuhler's involvement?
(93) SALOMON: I became aware of Mr. Geissbuhler because there was a check written off the Independent Mortgage account to him in the amount of $189,000. I interviewed him as to what the purpose of this payment was.
(93) MACKENZIE: And did he during the course of that interview provide you with other documents?
(93) SALOMON: Yes.
(93) MACKENZIE: In referring to what's been admitted as government Exhibit D.4 -- can you identify that document?
(93) SALOMON: Yes, I can.
(93) MACKENZIE: What is it?
(93) SALOMON: This is a copy of the Independent Mortgage check issued to Robert Geissbuhler, check number 1067 from the Independent Mortgage account.
(93) MACKENZIE: What is the date of it?
(93) SALOMON: May 14, 1991.
(93) MACKENZIE: And what is the amount?
(93) SALOMON: $189,000.
(93) MACKENZIE: What was your understanding as to how Geissbuhler -- first of all, let me ask you this. Is it a photocopy of the check?

(93) SALOMON: Yes.
(94) MACKENZIE: Did Mr. Geissbuhler have the original?
(94) SALOMON: No, he did not.
(94) MACKENZIE: What is your understanding why Mr. Geissbuhler had received that check from Mr. Manuel?
(94) SALOMON: Mr. Geissbuhler had standing relationship with Mr. Manuel that predates this. We invested sums of monies with him during the early parts of 1991. He has some additional funds that Mr. Manuel requested that he used on a short-term basis. This $189,000 check represented the repayment of those funds.
(94) MACKENZIE: And what is the check number?
(94) SALOMON: 1067.
(94) MACKENZIE: So there is a check in the same amount, $189,000, as the Oakland Title Company check of May 9, 1991.
(94) SALOMON: Yes, it is.
(94) MACKENZIE: Now did Geissbuhler try to deposit this check?
(94) SALOMON: No.
(94) MACKENZIE: Why not?
(94) SALOMON: He had history with Mr. Manuel where he received several checks in the past, which had not cleared. They bounced. So he did not want to deposit this check and have it bounce in his account. He held on to it, contacted the bank to see if there were monies in the account and when the check would clear.
(94) MACKENZIE: Obtaining this check from Mr. Geissbuhler bolstered your evidence against Henry

Manuel of bank fraud against Sterling Savings Bank?
(94) SALOMON: Yes.
(60) MACKENZIE: What did Smith tell you?
(60) SALOMON: Specifically, with regard to the Germany deal, Mr. Manuel needed to have significant cash assets in a top 100 bank, and he needed those monies in the bank to know that the Independent Mortgage Company had sufficient cash on hand to satisfy the lenders.
(60) MACKENZIE: What did Smith tell you as to the amount that Manuel needed?
(60) SALOMON: Depended when he talked to Mr. Manuel. Usually $500,000, and he tied that into a 500 million dollars deal that was going on in Germany.
(60) MACKENZIE: What was Smith's response?
(60) SALOMON: His response was no way that he or anybody he knew could put that kind of money together.
(65) MACKENZIE: What then happened after the return trip to Vienna?
(65) SALOMON: Anticipating the deal was indeed completed, he, acting on behalf of the investors, they wanted their money back, the initial investment back receiving the commission sometime later.
(65) MACKENZIE: What did Mr. Thomas Smith indicated what he tried to do?
(65) SALOMON: He contacted Mr. Manuel and requested the money back. That took some prodding, and eventually he was able to get two checks from Mr. Manuel, one in the amount of $50,000 and the other in the amount of $53,000.

(66) MACKENZIE: Did you determine -- those two checks, are they Exhibits A2 and C1?
(66) SALOMON: Yes.
(66) MACKENZIE: And what were the dates of those checks?
(66) SALOMON: Should be May 16, 1991.
(66) MACKENZIE: Did Smith indicate to you anything that he learned about the Citibank account that the two checks were drawn on?
(66) SALOMON: Yes.
(66) MACKENZIE: What did he indicate?
(66) SALOMON: Specifically, his investors who received the checks, Mr. Pietrzyk and Mr. Conklin, tried to cash them several times and there were no monies in the account. They couldn't determine exactly when the accounts went to a very low balance, but there were no funds close to handle either one of the checks.
(78) MACKENZIE: Now when you received that documentation and the Sterling Savings Bank records, did you track what Henry Manuel had done with those monies?
(78) SALOMON: Yes, I was.
(78) MACKENZIE: And what had Henry Manuel done with those other monies?
(78) SALOMON: The total of $53,000 was used to pay reexisting debts of Independent Mortgage and Henry Manuel.
(78) MACKENZIE: And had it been used quite quickly after Mr. Manuel received them?
(78) SALOMON: Yes, they were.
(78) MACKENZIE: Now returning briefly to Exhibits A2 and C1 which are two checks, the date of the checks is May 16, '91?

(78) SALOMON: That's correct.
(78) MACKENZIE: How many days is that after Mr. Manuel received the $32,000 from Mr. Smith for Charles Conklin's investment and his father's?
(78) SALOMON: That's only six days after that portion of the investment --
(78) MACKENZIE: What was the amount of time that Mr. Thomas Smith had represented to you that Mr. Manuel was going to keep those monies in the Independent Mortgage account to show the overseas investors?
(79) SALOMON: 10-15 days.
(79) MACKENZIE: Referring you specifically to C2, which has been admitted, can you indicate what the document is?
(79) SALOMON: Yes, that's a First Federal Bank and Trust notification of returned items.
(79) MACKENZIE: That's Mr. Conklin's check?
(79) SALOMON: Yes.
(79) MACKENZIE: Can you tell when the $53,000 check bounced?
(79) SALOMON: June 10, 1991.

CROSS EXAMINATION

(177) Defense Attorney Fred Gibson (GIBSON): What was the next significant document?
(177) SALOMON: Outside of bank records, no. I received Mr. Geissbuhler's check of $189,000 that he received from mortgages.
(177) GIBSON: Spell his name.
(177) SALOMON: G-E-I-S-S-B-U-H-L-E-R.
(177) GIBSON: You received a check from him in what amount.
(177) SALOMON: I received a copy of a check from Geissbuhler.
(177) GIBSON: Photocopy of a check?
(177) SALOMON: That's correct.
(177) GIBSON: He didn't have the original?
(177) SALOMON: No.
(178) GIBSON: I believe you testified that he never cashed the check?
(178) SALOMON: That's correct.
(178) GIBSON: Why? Do you have any idea he didn't have the original?
(178) SALOMON: He explained that he was so upset with dealings with Mr. Manuel, he thinks he destroyed the original.
(179) GIBSON: Do you have a photocopy of the check that you are making reference to?
(179) SALOMON: Yes I do.
(179) GIBSON: Thank you. We know for a fact that was never tendered to the bank. Is that correct?
(179) SALOMON: That's correct.
(180) GIBSON: Did he tell you why he had written that check to Mr. Geissbuhler?
(180) SALOMON: He had written that check.

(180) GIBSON: Yes or no?
(180) SALOMON: Yes.
(180) GIBSON: What was the reason?
(180) SALOMON: He owed Geissbuhler a significant amount of money.
(180) GIBSON: What was the significant nature of the monies that were due and owing?
(180) SALOMON: Hundreds of thousands of dollars.
(181) GIBSON: How is it that Mr. Manuel seemed to come up with this odd figure of $189,000?
(181) SALOMON: There was a specific short-term loan that he provided, that Mr. Geissbuhler provided Mr. Manuel, and Mr. Geissbuhler needed that money back so she was able, I believe, to complete construction on his house in Florida.
(192) GIBSON: Mr. Salomon, Exhibit D1, nothing about a photocopy of a check that was allegedly signed by Tom Smith?
(192) SALOMON: Yes.
(192) GIBSON: And Mr. Manuel already admitted the he completed all other writing in here?
(192) SALOMON: That's correct.
(195) GIBSON: You confirmed that Mr. Manuel deposited that check which he deposited in his account?
(195) SALOMON: This check was deposited by Mr. Manuel.
(195) GIBSON: That he deposited, correct, the bulk which he wrote out?
(195) SALOMON: He filled out -- he did everything on that document other than the Thomas Smith signature.

TRIAL TESTIMONY OF ROBERT GEISSBUHLER

(412) MACKENZIE: And did there come a time in January or February of 1991 that you loaned Henry Manuel some money?
(412) Robert Geissbuhler (GEISSBUHLER): Right.
(412) MACKENZIE: And what did it get to?
(412) GEISSBUHLER: Million two.
(412) MACKENZIE: And in the spring of '91, were you looking for a particular repayment of that loan?
(413) GEISSBUHLER: I was looking for a partial payment to pay my state and federal tax, and I had lent Henry $175,000 at that time, and I tracked Henry down to a place where he was vacationing in Florida, Disneyland, and at that time he said Tom Smith will have your money for you.
(413) MACKENZIE: And then what did you do after receiving that information from Manuel?
(413) GEISSBUHLER: I tracked down Tom Smith.
(414) MACKENZIE: What was his response, if any?
(414) GEISSBUHLER: I really don't remember his response. He just kind of pled ignorance to the whole thing, and that's when I got suspicious that something was going on.
(414) MACKENZIE: Do you recall giving that photocopy of that check to Agent Salomon?
(414) GEISSBUHLER: Yeah.
(414) MACKENZIE: Do you remember, did you have the original on that check?
(415) GEISSBUHLER: I had the original at one time and I threw it away.
(415) MACKENZIE: But you made a photocopy of it?

(415) GEISSBUHLER: For my records. It was -- I figured it was a bogus check. I pitched it.
(415) MACKENZIE: And what did you do with respect to that check? Did you try to deposit it?
(415) GEISSBUHLER: I went to a Sterling Bank in Waterford in the Waterford area. I went in there to see if there were funds to cover the check, and they said no -- well, that's not correct. Henry put another check in there for this bogus check, and I had to wait for the next five days until the check cleared, we cannot issue a cashier's check.
(415) MACKENZIE: And did you call the bank and try to find out whether that check cleared?
(415) GEISSBUHLER: Oh, yeah. I called for a whole week, and after a week I decided it was another scam.
(415) MACKENZIE: You had a prior bad experience with checks from Mr. Manuel?
(415) GEISSBUHLER: Yeah, he always said he would send me cashier's checks. I was building a house in Florida, and he was -- he was quote, unquote, wiring money to the bank down in Florida, and the checks never came through. Never came through, and I got suspicious that something was going on.

(422) GIBSON: And he was able to -- to use your term -- con you, a sophisticated person over a year and half and get 1-2 million from you?
(422) GEISSBUHLER: Yes.
(422) GIBSON: Sir, what eventually tipped you off, and listen, I should not give this man any more money?
(423) GEISSBUHLER: I needed money to pay my income taxes, and that was supposed to be a payment. It never came, never came, and then he wrote this check right here, and that never cleared, and then I just went to an attorney and said hey, I think I have a problem here.
(423) GIBSON: Okay.
(423) GEISSBUHLER: And what transpired was a couple of more communications with Manuel. He said, I will have the check for you tomorrow. Three days down the street, nothing happened, and then I went to the Oakland County prosecutor and told him the story, and I don't know whatever happened after that. I know he went to jail.
(424) GIBSON: And you indicated -- you indicated you gave a photocopy of the check -- this check to Agent Salomon?
(424) GEISSBUHLER: Right.
(424) GIBSON: You also indicated that you kept -- sir, why would keep a photocopy as opposed to the original document?
(424) GEISSBUHLER: I guess I should have, but I knew the check was no good, I tore it up and put it in the wastebasket.

(425) GIBSON: When you spoke to Mr. Smith, did you say, listen, Tom, Henry said you will have my check for $175,000, or did you just say, Henry said you got my check?
(425) GEISSBUHLER: I told him that he was supposed to have my check. Henry said it was for $175,000/
(425) GIBSON: And you indicated in response to Mr. Mackenzie's question that, in fact, shortly thereafter, within days, you received a check from Manuel.
(425) GEISSBUHLER: Not days, I would probably -- maybe two months.
(425) GIBSON: Two months?
(426) GEISSBUHLER: One month later.
(426) GIBSON: One month later after that communication?
(426) GEISSBUHLER: Check was dated the 14th, tax day was the 15th. I put an extension on the income tax and waited for the check to come.
(426) GIBSON: I am having difficulty hearing.
(426) GEISSBUHLER: I anticipated getting a check to pay my income tax for the balance of the year, and it didn't come from Tom, and Henry gave me this check, and I tried to cash it, and it was no good.

TRIAL TESTIMONY OF RICHARD SALOMON AND HENRY MANUEL

CONCERNING THE CREDIT AGREEMENT AND PROMISSORY NOTE

MACKENZIE AND SALOMON

(95) MACKENZIE: During the course of your investigation, did there come a time that Henry Manuel's attorney, Frank Rhoades, was informed that federal charges were brought against Henry Manuel?
(95) SALOMON: Yes.
(96) MACKENZIE: And did Manuel's attorney provide you with some documents at that time?
(96) SALOMON: Yes, he did.
(98) MACKENZIE: Now Agent Salomon, the documents that you have in front of you, does that purport to be an original document?
(98) SALOMON: Yes, sir.
(98) MACKENZIE: All right. And what does that document purport to be?
(98) SALOMON: That's titled "Credit Agreement of the Independent Mortgage Corporation."
(98) MACKENZIE: What is the date on it?
(98) SALOMON: 21st day of April 1991.
(102) MACKENZIE: What does this document purport to be?
(102) SALOMON: A promissory note, the Independent Mortgage Corporation promissory note.
(102) MACKENZIE: Between whom?

(102) SALOMON: Between Thomas Smith and Henry Manuel doing business as Independent Mortgage Corporation.
(102) MACKENZIE: The document in front of you appears to be the original?
(102) SALOMON: Yes.
(107) MACKENZIE: I think we need to go back and make sure we make this clear. When you got ht purported original credit agreement from Mr. Manuel's attorney in May 1994, what did you do with the document?
(107) SALOMON: When I received the credit agreement, Mr. Manuel's attorney told me the agreements are the original and the promissory note that's attached is a copy, and Manuel has the original promissory note. Upon obtaining that, I preserved the original portions of that document, the first four pages of the Credit agreement for further analysis by the F.B.I. Laboratory.
(108) MACKENZIE: Now you give a photocopy of credit agreement to Henry Manuel with a copy of the promissory note on October 17, 1994?
(108) SALOMON: Yes.
(108) MACKENZIE: And the same date you receive the original promissory note?
(108) SALOMON: Yes.
(108) MACKENZIE: What did you do with the original promissory?
(108) SALOMON: I kept it in my custody until I forwarded it to the laboratory for evaluation.

TRIAL TESTIMONY OF HENRY MANUEL

MACKENZIE AND MANUEL

(497) MACKENZIE: One of the things it doesn't seem to flow well as one document, but referring you to -- for example, tell the jury how this document came about?
(497) Henry Manuel (MANUEL): So Independent Mortgage, basically myself, contacted an attorney out of Detroit, and he drew up this agreement that would allow the independent Mortgage to borrow monies or funds from individuals or corporations and meet all the requirements so that we did not violate any security exchange rules, that's why it was for six months.
(498) MACKENZIE: Are you indicating that you have a form from the attorney?
(498) MANUEL: Yes, the initial form was drawn up, and that was put into the computer, and then it would be used for format, and then any particular adjustments that needed to be done for the particular situations, it would be made from that.
(498) MACKENZIE: And did you make adjustments on the original for -- on this agreement, Q1a through d?
(498) MANUEL: That's correct.
(498) MACKENZIE: Did you do that yourself?
(498) MANUEL: Yes.
(498) MACKENZIE: What about the promissory note? Is that based on some form that you had?
(498) MANUEL: Yes, it is.

(208) GIBSON: Yes, sir.
(208) SALOMON: I need to review each page where my thoughts are.
(208) GIBSON: Sir, there was originally in 1994 a proceeding brought or a complaint brought against Mr. Smith, is that correct?
(208) SALOMON: That's correct.
(208) GIBSON: Two counts of perjury, correct?
(208) SALOMON: Yes.
(208) GIBSON: Which is why we are here today?
(208) SALOMON: Yes.
(208) GIBSON: You still have to look through the transcript to figure out what he did wrong?
(208) MACKENZIE: I object. I think we have been over this.
(208) THE COURT: Sustained. The indictment speaks for itself. That contains the charges, and it doesn't matter what the agent thinks as the basis for going forward. The trial is based on the indictment, and what's contained therein.

TRIAL TESTIMONY OF CHARLES CONKLIN

(301) MACKENZIE: Are you employed?
(301) Charles Conklin (CONKLIN): Yes
(301) MACKENZIE: What's your occupation?
(301) CONKLIN: Real estate agent.
(301) MACKENZIE: Have you had any other employment in the last six or seven years?
(301) CONKLIN: Licensed builder.
(302) MACKENZIE: Did there come a time in 1991 you became aware of money available to borrow from overseas investors?
(302) CONKLIN: Yes.
(302) MACKENZIE: What was the information that you had received?
(302) CONKLIN: From a guy that used to have coffee in the coffee shops, that he knew a bank that was loaning money to the right people, and he wanted to know if I knew people with large amounts of money. At the time I didn't.
(302) MACKENZIE: Did you pass that information on to anyone?
(302) CONKLIN: Yes. I passed it on to Tom Smith.
(302) MACKENZIE: And do you recall what, if anything, happened after you passed that information on?
(302) CONKLIN: Yeah. He got back with me that he knew somebody that might qualify.
(302) MACKENZIE: And do you know who that person was?
(302) CONKLIN: Henry Manuel.
(302) MACKENZIE: Did you have any idea what the relationship had been?
(302) CONKLIN: At that time no.

(302) MACKENZIE: Do you recall the name of the overseas lenders contact person at all?
(302) CONKLIN: No, I don't.
(302) MACKENZIE: Did you have any knowledge yourself about who the overseas lenders were?
(302) CONKLIN: Personally, no.
(302) MACKENZIE: Did you come to have some knowledge from some other source?
(302) CONKLIN: Pardon?
(302) MACKENZIE: Did you come to have some knowledge of the people from other sources?
(302) CONKLIN: I knew they were overseas people.
(302) MACKENZIE: Who did you know that from?
(302) CONKLIN: The guy at the coffee shop.
(302) MACKENZIE: You didn't know any specific identities?
(302) CONKLIN: I heard names. I might know them if I heard them again.
(302) MACKENZIE: Were you in the position to qualify yourself?
(302) CONKLIN: No.
(302) MACKENZIE: Do you recall what amount of money was being discussed as available from overseas?
(302) CONKLIN: Millions of dollars that was available.
(304) MACKENZIE: Were you yourself interested in being able to use some of the loan money if they were brought over?
(304) CONKLIN: Yes.
(304) MACKENZIE: For what purposes?
(304) CONKLIN: For a development that I was involved in.
(304) MACKENZIE: What was that development?

(304) CONKLIN: Mariner's Cove.
(304) MACKENZIE: With whom were you involved in that development?
(304) CONKLIN: Six people total.
(304) MACKENZIE: Did there come a time that you actually requested to put some money into this investment?
(304) CONKLIN: I was asked -- no, I was not really asked. I was told they were running short a little bit, and if there was anybody that could contribute, and so I contributed.
(304) MACKENZIE: Let me back up a little bit. Did there come a time that Joe Pietrzyk was approached about putting money into it?
(304) CONKLIN: Yes.
(304) MACKENZIE: Who did that approach to Joe Pietrzyk?
(304) CONKLIN: It came from me.
(304) MACKENZIE: Why did you approach him?
(304) CONKLIN: Because we needed some money.
(304) MACKENZIE: What were you told as to why?
(304) CONKLIN: I was told Henry Manuel was running a little short for what was considered to make the loan, and he was trying to dig up more money, and I went to Joe Pietrzyk to see if he was interested in making a loan for a large profit, short-term.
(305) MACKENZIE: What assurances were communicated to Mr. Pietrzyk about the use of his money?
(305) CONKLIN: Tom was guaranteeing it.
(305) MACKENZIE: Were there some representations about how Mr. Pietrzyk's money would be used?

(305) CONKLIN: It would sit in the bank a few days to show the strengths for Mr. Manuel, and then be returned with a nice profit.
(305) MACKENZIE: And do you recall what that profit was supposed to be?
(306) CONKLIN: Somewhere between one and $300,000. It was a large profit.
(307) MACKENZIE: And did Mr. Pietrzyk, based on that assurance, and based on representations of the use of his money, invest $50,000?
(307) CONKLIN: Yes.
(307) MACKENZIE: And do you recall how he did that? What the manner was?
(307) CONKLIN: I went with him to the bank, and he transferred it to Citibank in Chicago I think it was.
(307) MACKENZIE: And did you have any understanding what the Citibank of Chicago was supposed to be?
(307) CONKLIN: I understand he had to have assets into a large bank, not a local bank.
(307) MACKENZIE: Do you know what the account name was or anything like that?
(307) CONKLIN: Not that I can recall, no.
(307) MACKENZIE: Did you have an understanding at some point after that time that more money was needed?
(307) CONKLIN: Yes.
(307) MACKENZIE: How did that come about?
(307) CONKLIN: It was brought to my attention right towards the time the loan was to be made that he was short some money, and wanted to know if we could come up with some more. I went home and

talked to the wife, and I had 10,000 sitting in one account. I gave the 10,000.
(309) MACKENZIE: Do you recall what happened with respect to your money?
(309) CONKLIN: Disappeared.
(309) MACKENZIE: And did you at some point receive some reimbursement for your money?
(310) CONKLIN: A check.
(310) MACKENZIE: Referring you to what's been admitted as Government Exhibit C1, do you recognize that at all?
(310) CONKLIN: Yes.
(310) MACKENZIE: What is that?
(310) CONKLIN: That's a check made out for me for 53 five.
(310) MACKENZIE: You put in $10,000?
(310) CONKLIN: Right.
(310) MACKENZIE: What's the date on that check?
(310) CONKLIN: 5-16-91.
(310) MACKENZIE: Do you recall when you invested your money, your $10,000?
(310) CONKLIN: Sometime in May.
(310) MACKENZIE: Who gave you that check?
(310) CONKLIN: Tom Smith the best that I can recall.
(310) THE COURT: Repeat that question.
(310) MACKENZIE: Do you recall who gave you that $53,500 check?
(310) CONKLIN: I think it was Tom Smith.
(310) MACKENZIE: And what did you do with it?
(310) CONKLIN: I cashed it.
(310) MACKENZIE: Do you recall, did you try to cash it right away or hand onto it for a few days?
(311) CONKLIN: I don't recall.

(311) MACKENZIE: Let me show you this document. Does that look familiar?
(311) CONKLIN: Yep, First Federal Savings.
(311) MACKENZIE: Did you have an account there?
(311) CONKLIN: That's personal, yes.
(311) MACKENZIE: And that document is a notification of the bounced check?
(311) CONKLIN: Yes.
(311) MACKENZIE: And what's the date on that check?
(311) CONKLIN: 6-10-91.
(312) MACKENZIE: And you deposited it?
(312) CONKLIN: Right.
(312) MACKENZIE: And you deposited it soon after you received it?
(312) CONKLIN: Whatever the date on there is. I think I did. I don't know if it was the same day or the next day.

TRIAL TESTIMONY OF JOE PIETRZYK

(335) MACKENZIE: Do you know a Charles Conklin?
(335) Joe Pietrzyk (PIETRZYK): Yes.
(335) MACKENZIE: How do you know Mr. Conklin?
(335) PIETRZYK: I got the restaurant through him.
(335) MACKENZIE: You bought the restaurant from him?
(336) PIETRZYK: He was the real estate agent for the restaurant.
(336) MACKENZIE: When was that?
(336) PIETRZYK: About 12 years.
(336) MACKENZIE: And have you maintained a relationship with Mr. Conklin over the years?
(336) PIETRZYK: Right.
(336) MACKENZIE: And you consider him a friend?
(336) PIETRZYK: Yes.
(336) MACKENZIE: Do you know Tom Smith?
(336) PIETRZYK: Yes.
(336) MACKENZIE: How do you know Tom Smith?
(336) PIETRZYK: Through Pike (Conklin).
(336) MACKENZIE: And do you have an on-going relationship with Mr. Smith to this day?
(336) PIETRZYK: I wouldn't say on-going. I never talk to him.
(337) MACKENZIE: Did there come a time in 1991 that you made an investment of $50,000 with your money?
(337) PIETRZYK: Right.

(337) MACKENZIE: How did you find out about that investment?
(337) PIETRZYK: Pike talked to me about it.
(337) MACKENZIE: What was your understanding of this investment?
(337) PIETRZYK: I was to invest $50,000 for 10 days or so to put into a Mr. Manuel's account so he could obtain a loan, and I would get my money back plus some interest.
(337) MACKENZIE: When you made that investment, did you receive any documentation?
(337) PIETRZYK: I received something. I don't remember exactly when it was.
(339) MACKENZIE: Do you recall what Tom Smith's role in this at that time was?
(339) PIETRZYK: Not really. I was dealing with Pike.
(339) MACKENZIE: Did you have this agreement from Tom Smith guaranteeing your repayment?
(339) PIETRZYK: Yes.
(340) MACKENZIE: What is the one you brought with you today?
(340) PIETRZYK: A check for $50,000 from Manuel, and it bounced.
(340) MACKENZIE: Made payable to who?
(340) PIETRZYK: To me.
(340) MACKENZIE: And the other document that's been admitted as an exhibit, is that a photocopy of that check?
(340) PIETRZYK: Yes.
(340) MACKENZIE: What's the date on that check?
(340) PIETRZYK: 5-16-91.
(341) MACKENZIE: Let me start over. You deposited -- wired your 50,000 on April 22nd?

(341) PIETRZYK: Right.
(341) MACKENZIE: When were you expecting to receive your monies back?
(341) PIETRZYK: Within a couple of weeks.
(341) MACKENZIE: And did you get your money back in a couple of weeks?
(341) PIETRZYK: No.
(341) MACKENZIE: Was it sometime after that you received that check?
(341) PIETRZYK: Right.
(341) MACKENZIE: And were there any efforts made to get that money before you got that check back that you were aware?
(341) PIETRZYK: I made a lot of them.
(341) MACKENZIE: When you got the check back and deposited it and it bounced, what, if anything, did you do then?
(341) PIETRZYK: I can't remember right offhand. After I -- I had it for a while, I called my lawyer, and he told me to turn it into the White Lake Police and send a registered letter to Mr. Manuel that I had a check of his, and the White Lake Police said it was out of our hands because he took over, Mr. Salomon.
(341) MACKENZIE: Do you recall making out a complaint with the White Lake Township Police department?
(341) PIETRZYK: Yes.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	CRIMINAL NO. 94-81126
-vs-	HONORABLE PAUL D. BORMAN
D-1 THOMAS MARK SMITH, Defendant.	VIO.
	18 U.S.C. § 1623 (FALSE DECLARATIONS)
	18 U.S.C. § 1343 (WIRE FRAUD)
	18 U.S.C. § 1344(1) (BANK FRAUD)
	18 U.S.C. § 2(a) (AIDING & ABETTING)

SECOND
SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT ONE
(18 U.S.C. § 1623- False Declarations Before Grand Jury)

D-1 THOMAS MARK SMITH

GENERAL ALLEGATIONS

1. In 1993, Grand Jury No. 93-2, a Grand Jury of the United States sitting in the Eastern District of Michigan, in Detroit, was conducting an investigation to determine whether one Henry Manuel committed wire fraud (18 U.S.C. § 1343), transported in interstate commerce money taken by fraud (18 U.S.C. § 2314), or committed bank fraud (18 U.S.C. § 1344).

2. The Grand Jury's investigation against Henry Manuel for wire fraud and the interstate transportation of money taken by fraud pertained to his acquisition of certain investors' monies, part of which had been wire transferred to Henry Manuel's corporate account at Citibank, in Chicago, Illinois, in the name Independent Mortgage corporation, and then transported back again to Manuel's corporate account at Sterling Savings Bank, FSB, in Lake Angelus, Michigan, also in the name Independent Mortgage Corporation.

3. The evidence of Henry Manuel's scheme to defraud investors included the following:

A. On or about October 1, 1991, one Joe Pietrzyk, a resident of West Bloomfield, Michigan, filed a complaint with the White Lake Township Police Department against Henry Manuel for providing him with a bad check in the amount of $50,000.00. As the Federal Bureau of Investigation (FBI) had knowledge of some of Henry Manuel's fraud activities, the complaint was referred to Special Agent Richard Salomon of the FBI.

B. Special Agent Salomon interviewed Joe Pietrzyk and Charles Conklin, aka "Pike" , on November 12, 1991. Pietrzyk indicated that he had

been defrauded out of $50,000.00 by Henry Manuel. Conklin indicated he had been defrauded out of $10,000 by Henry Manuel.

C. Pietrzyk told Special Agent Salomon that on April 22, 1991, he had wire transferred $50,000.00 to Henry Manuel's corporate account at Citibank in Chicago, and that the account was in the name of Manuel's company, Independent Mortgage Corporation.

D. Conklin told Special Agent Salomon that on May 10, 1991, he had provided $10,000 to defendant THOMAS MARK SMITH who, in turn, provided Henry Manuel with a cashier's check in that amount.

E. In explaining how Pietrzyk's and Conklin's investments had come about, Conklin told Special Agent Salomon that in early 1991 he had learned of an opportunity for a qualified borrower to obtain a large amount of loan money at reasonable interest rates from foreign lenders.

F. Conklin told Special Agent Salomon that he passed this information on to his friend and fellow investor in certain real estate, the defendant THOMAS MARK SMITH.

G . Conklin told Special Agent Salomon that defendant SMITH told him that he knew a person, named Henry Manuel, who might be able to qualify for such a large loan and have the expertise to negotiate the terms of the loan.

H. Conklin also told Special Agent Salomon that he and Pietrzyk had made their respective investments because SMITH had represented that Henry Manuel was negotiating a large loan from foreign lenders, but that in order to qualify for the

loan, Henry Manuel had to show substantial cash on deposit in an account with his bank.

I. Conklin also told Special Agent Salomon that SMITH had represented that their money would not be transferred from Manuel's account or otherwise used except to demonstrate to the foreign lenders the cash on deposit.

J. Conklin also told Special Agent Salomon that SMITH had represented that their money would be returned to them in seven to ten days, or no later than two weeks, with a substantial return of interest.

K. Pietrzyk also told Special Agent Salomon that he did not receive his $50,000.00 investment or any return thereon, but, in early June, 1991, after demanding the return of his money, obtained from defendant THOMAS MARK SMITH, an independent Mortgage Corporation check. The check, dated May 16, 1991, was drawn against Independent's account at Citibank, Chicago, and had been completed by Henry Manuel and made payable to Pietrzyk in the amount of $50,000.00. The check failed to clear due to insufficient funds in the Independent Mortgage Corporation account at Citibank, Chicago. Pietrzyk subsequently filed his complaint with the White Lake Township Police Department.

L. Conklin told Special Agent Salomon that he also received an Independent Mortgage Corporation check from defendant THOMAS SMITH in repayment of his investment . This check, dated May 16, 1991, was also drawn against Independent's account at Citibank, Chicago, and had been completed by Henry Manuel and made payable to Conklin in the amount of $53,500. Conklin

understood that the check was in this amount in order to repay his $10,000 investment and the defendant THOMAS SMITH's investment of $21,500 and the investment of defendant's father, James Smith, of $22,000. Conklin deposited this check and it failed to clear due to insufficient funds in the account at Citibank, Chicago.

M. On or about November 13, 1991, with the investigation of Henry Manuel, Special Agent Salomon interviewed defendant THOMAS MARK SMITH. SMITH told Agent Salomon that he and three other investors had been defrauded out of $103,500.00 by Henry Manuel.

N. Defendant THOMAS MARK SMITH also told Special Agent Salomon that he had provided the $103,500.00 to Henry Manuel in April and May, 1991. SMITH also told Special Agent Salomon that the $103,500.00 consisted of the funds that he had obtained from the three other investors - Joe Pietrzyk ($50,000.00), Charles "Pike" Conklin ($10,000.00), and James Smith, defendant's father ($22,000.00) - as well as his own investment ($21,500.00).

O. Defendant THOMAS MARK SMITH also told Special Agent Salomon that he had provided the-$103,500.00 to Manuel to use for a period of 10 to 15 days, whereafter Manuel was to return the monies with a 100% return on the investment.

P. Defendant THOMAS MARK SMITH also told Special Agent Salomon that Manuel had requested the short-term use of the $103,500.00 in order to show sufficient cash deposits in the bank account of his company, the Independent Mortgage

corporation, at Citibank, in Chicago, as a condition of obtaining an offshore loan from foreign lenders.

Q. Defendant THOMAS MARK SMITH also told Special Agent Salomon that Manuel was negotiating with these foreign lenders for a multi-million dollar loan at a favorable interest rate from which SMITH and his fellow investors might obtain approximately one million dollars to develop certain real property that they had acquired.

R. Defendant THOMAS MARK SMITH also told special Agent Salomon that he knew Manuel had been negotiating with the foreign lenders because SMITH himself had approached Manuel to negotiate the multi-million dollar loan with the foreign lenders and had himself provided Manuel with the name of the contact to the foreign lenders he had originally received from Charles "Pike" Conklin. Defendant THOMAS MARK SMITH also stated that he had overheard Manuel on, at least, one occasion discussing the foreign loan money on the telephone with the contact.

S. Defendant THOMAS MARK SMITH stated that he had approached Manuel to engage in the negotiations with the foreign lenders because he knew of Manuel's expertise from his own prior dealings as the former owner of Oakland Title Company, with Manuel and his company, the Independent Mortgage Corporation.

T. Defendant THOMAS MARK SMITH also told Special Agent Salomon that on or about April 22, 1991, Joe Pietrzyk wire transferred $50,000.00 to Manuel's corporate account at Citibank in Chicago and that SMITH provided the additional $53,500.00 to Manuel, but that at the time these funds were

transferred to Manuel, Manuel was not authorized to spend or disburse any of the monies for any reason.

U. Defendant THOMAS MARK SMITH also told Special Agent Salomon that when Manuel delayed in returning the money, Manuel explained to SMITH that he had traveled to Vienna, Austria, to close the multi-million dollar loan and that there was simply a delay in transferring the loan money from overseas.

V. Defendant THOMAS MARK SMITH also told Special Agent Salomon that after Manuel had failed to return the investors' monies upon their repeated demands, Manuel gave SMITH two Independent Mortgage corporation checks drawn against Independent's account at Citibank, Chicago, one in the amount of $50,000.00 made payable to Joe Pietrzyk and the other in the amount of $53,500.00 made payable to Charles Conklin, but that both of these checks failed to clear due to insufficient funds in the Independent Mortgage Corporation account at Citibank, Chicago.

W. Defendant THOMAS MARK SMITH also told Special Agent Salomon that he himself, like each of the three other investors, was a victim of Henry Manuel's scheme to defraud.

4. During the course of the investigation of Henry Manuel, defendant THOMAS MARK SMITH was served with a grand jury subpoena compelling him to provide testimony regarding these matters.

FALSE DECLARATIONS

5. On or about May 25, 1993, in the Eastern District of Michigan, Southern Division, THOMAS

MARK SMITH, defendant herein, while under oath and testifying in a proceeding before Grand Jury No. 93-2, did knowingly make false material declarations.

6. Specifically, defendant THOMAS MARK SMITH knowingly made the following declarations in response to questions regarding the investors' monies:

> Q. What happened then, after you provided the money to him?
> A. So the money was provided. Mr. Manuel indicated that it was, that the investors overseas had confirmed it, and that he was going to depart for Vienna.
> Q, Again, is there any restrictions placed on the money that you are providing to him; in other words -
> A. [Interposing] It was to sit in the account. There were no fees Mr. Manuel had to pay to obtain the loan. It was strictly a show of cash deposit from his side showing that he had some liquid assets, and the money was to sit there for no more than two weeks, ten days, and that it would be returned to us.
>
> ******
>
> Q. Basically was your agreement based on a handshake or on a legal document.
> A. Mr. Manuel gave my father a note that said he would pay back the $44,000.00 by a certain date.
>
> ******
>
> Q. So of the four investors, your father is the one that -

A. [Interposing] Right. Myself and Mr. Conklin basically handshaked. I'm not sure if Mr. Pietrzyk got any agreement.

Q. No notary, nothing on that document?

A. No, it's a promissory note. It's not a recordable document.

Q. I understand that. Was there any other documents?

A. As far as our money, no.

7. The aforesaid testimony of defendant THOMAS MARK SMITH, as he then and there well knew and believed, was false in that THOMAS MARK SMITH had, on or about April 21, 1991, executed and delivered to Henry Manuel two documents, to wit: (1) A document entitled "Credit Agreement of the Independent Mortgage Corporation," dated April 21, 1991, which credit agreement pertains to the $103,500.00 Manuel had acquired from defendant THOMAS MARK SMITH, Joe Pietrzyk, Charles Conklin, and James Smith, and permits Henry Manuel to use the monies for the business purposes of his corporation, the Independent Mortgage Corporation, for a period of six months; and (2) another document entitled "Promissory Note," dated April 21, 1991, which incorporates the aforesaid credit agreement by reference and is signed by the defendant THOMAS MARK SMITH, and in which Henry Manuel promises to repay defendant THOMAS MARK SMITH the sum of $103,500.00 within six months of April 21, 1991.

All in violation of Title 18, United States Code, Section 1623.

COUNT THREE
(18 U.S.C. § 1623- False Declarations Before Grand Jury)

D-1 THOMAS MARK SMITH

GENERAL ALLEGATIONS

1. In 1993, Grand Jury No. 93-2, a Grand Jury of the United States sitting in the Eastern District of Michigan, in Detroit, was conducting an investigation to determine whether one Henry Manuel committed wire fraud (18 U.S.C. § 1343), transported in interstate commerce money taken by fraud (18 U.S.C. § 2314), or committed bank fraud (18 U.S.C. § 1344).

2. The Grand Jury's investigation against Henry Manuel for bank fraud pertained primarily to a $189,000.00 check purportedly signed by defendant THOMAS MARK SMITH and dated May 8, 1991. The check was drawn against the account of defendant THOMAS MARK SMITH'S former company, Oakland Title Company, at First of America Bank- Oakland Macomb, N.A., in Pontiac, Michigan, and was made payable to Henry Manuel's company, Independent Mortgage Corporation.

3. The evidence of the bank fraud included the following:

A. On or about May 9, 1991, Henry Manuel caused the above-described Oakland Title Company check, check no. 5690, to be deposited into the Independent Mortgage Corporation bank account at Sterling Savings Bank, FSB, in Lake Angelus, Michigan.

B. Shortly thereafter, Manuel signed and had delivered to Robert Geissbuhler an Independent Mortgage Company check, No. 1067, dated May 14, 1991, in the like amount of $189,000.00, drawn against the company's account at Sterling Savings Bank and payable to the order of Robert Geissbuhler in repayment of a debt Manuel owed to Geissbuhler.

C. On or about May 14, 1991, First of America Bank returned the Oakland Title Company check unpaid to Sterling Savings Bank because there were insufficient funds in the Oakland Title Company account to cover the check.

D. On or about May 10, 1993, Special Agent Richard Salomon, of the FBI, interviewed defendant THOMAS MARK SMITH with regard to the $189,000.00 Oakland Title Company check.

E. Defendant THOMAS MARK SMITH told Special Agent Salomon that he had stopped doing business as Oakland Title Company in 1990 and that the company's account with First of America Bank was dormant thereafter, with less than one hundred dollars on deposit.

F. Defendant THOMAS MARK SMITH also told Special Agent Salomon, after examining a photocopy of the Oakland Title Company check in question, check no. 5690, that the signature on the check appeared to be his; that all of the other writing on the check was Henry Manuel's; that he had never received any instructions or requests from Manuel to issue the check; and that he had no recollection of signing the check or of signing any blank check for Henry Manuel.

4. During the course of the investigation of Henry Manuel, defendant THOMAS MARK SMITH

was served with a grand jury subpoena compelling him to provide testimony regarding these matters.

FALSE DECLARATIONS

5. On or about May 25, 1993, in the Eastern District of Michigan, Southern Division, THOMAS MARK SMITH, defendant herein, while under oath and testifying in a proceeding before Grand Jury No. 93-2, did knowingly make false material declarations.

6. Specifically, defendant THOMAS MARK SMITH knowingly made the following declarations in response to questions regarding the $189,000.00 Oakland Title Company check, check no. 5690:

> Q. Now, Mr. Smith, I want to show you one other document that is not related to. . . I'm just going to show you another document. It has nothing to do with this transaction that we have talked about. Have you seen this before?
>
> A. Yah, I seen this two weeks ago.
>
> Q. First of all, what does it purport to be and when did you see it?
>
> A. It purports to be a check drawn on my old company, to the Independent Mortgage for Oakland Title Company $189,000.00.
>
> Q. For how much?
>
> A. $189,000.00.
>
> Q. Does it appear to be your signature?
>
> A. Yes, it is my signature.
>
> Q. What about the handwriting?
>
> A. That is not my handwriting.
>
> Q. Do you know whose it is?

A. Based on my experience, that is Mr. Manuel's.

Q. So this account payable is a check drawn on your former company's account with First of America $189,000 made payable to Mr. Manuel's company, Independent Mortgage?

A. That's correct.

Q. The date on it?

A. May 8th, 1991.

Q. Did you write such a check?

A. I did not write a check for $189,000.00 to Independent Mortgage.

Q. Did you sign a blank check?

A. Not to my knowledge. I did not hand him that check.

Q. You saw it for the first time when?

A. Two weeks ago.

Q. How did you see it?

A. Mr. Salomon from the F.B.I.

Q. He showed you?

A. Yes, he did.

******

Q. Are you missing $189,000.00 too?

A. No.

Q. Actually, maybe I should clarify that too. When did your company go out of business, when did you sell your company?

A. Middle to last of 1990.

Q. This check is written when?

A. 1991.

Q. Or purported he had written it May 8th, 1991?

A. It's dated May 8th, 1991.

Q. Would you have been writing checks on the Oakland-

A. (Interposing) Absolutely not.

Q. Was that account still open to your knowledge?

A. I believe it was but there was less than $100.00 in it.

Q. It would have been, as far as you know - - did you still have control of that account in '91?

A. Yes, I did.

Q. That check never came came through that you knew about having bounced?

A. No. My bank statements went to Oakland Title on Dixie Highway, which is now being run as Oakland Title of Michigan.

Q. That was the successor to your company?

A. Successor. I have never been notified of the bank statement or the bank calling me or anything in regards to this check.

7. The aforesaid testimony of defendant THOMAS MARK SMITH, as he then and there well knew and believed, was false in that THOMAS MARK SMITH, on or about May 8, 1991, had signed and delivered to Henry Manuel the Oakland Title Company check no. 5690, for the purpose of aiding and abetting Henry Manuel in Manuel's attempt to commit bank fraud by paying off the debt he owed to one Robert Geissbuhler with an NSF check.

All in violation of Title 18, United States Code, Section 1623.

COUNT FOUR
(18 U.S.C. §§ 1344(1), 2(a) - Bank Fraud, Aiding & Abetting)

D-1 THOMAS MARK SMITH

GENERAL ALLEGATIONS

1. At all times relevant to this Superseding Indictment, the Sterling Savings Bank, FSB, was a financial institution based in Oakland County, Michigan, whose deposits were insured by the Federal Deposit Insurance Corporation.

2. At all times relevant to this Superseding Indictment, Independent Mortgage Corporation was owned, operated, and controlled by Henry Manuel and maintained an account at Sterling Savings Bank.

3. Defendant THOMAS MARK SMITH once managed, owned, and operated the Oakland Title Company, which maintained an account at First of America Bank- Oakland Macomb, N.A.

SCHEME TO DEFRAUD

4. In 1991 Henry Manuel devised a scheme to defraud Sterling Savings Bank through which he would pay off his large debt to one Robert Geissbuhler with an NSF check drawn against the Independent Mortgage Corporation account at Sterling Savings Bank.

5. It was a part of the scheme that defendant THOMAS MARK SMITH would sign and provide to Henry Manuel a blank check drawn against the Oakland Title Company account at First of America Bank.

6. It was also a part of the scheme that Henry Manuel would made the blank check payable to his company, Independent Mortgage Corporation, in the amount of $189,000.00, and would then cause the check to be deposited into the Independent Mortgage Corporation account at Sterling Savings Bank.

7. It was also a part of the scheme that Sterling Savings Bank would credit the Independent Mortgage Corporation account in the amount of $189,000.00.

8. It was also a part of the scheme that Henry Manuel would write a check drawn against the Independent Mortgage Corporation account at Sterling Savings Bank and make it payable to Robert Geissbuhler in the amount of $189,000.00.

9. It was also a part of the scheme that Robert Geissbuhler would negotiate the check as full payment of the debt owed to him by Henry Manuel.

10. On or about May 9, 1991, in an attempt to execute the scheme to defraud Sterling Savings Bank, Henry Manuel completed the check signed in blank and given to him by defendant Thomas Mark Smith, making it payable to his company, Independent Mortgage Corporation, in the amount of $189,000.00; caused the check to be deposited into the Independent Mortgage Corporation account at Sterling Savings Bank and then signed and caused to be delivered to Robert Geissbuhler a check drawn against the Independent Mortgage Corporation account at Sterling Savings Bank, check no. 1067, that was dated May 14, 1991, and made payable to Robert Geissbuhler in the amount of $189,000.00.

AIDING AND ABETTING

11. On or about May 8, 1991, in the Eastern District of Michigan, Southern Division, THOMAS MARK SMITH, defendant herein, did knowingly aid and abet Henry Manuel's attempt to execute the scheme to defraud Sterling Savings Bank, in that defendant THOMAS MARK SMITH signed and provided to Henry Manuel a blank check drawn against the Oakland Title Company account at First of America Bank- Oakland Macomb, N.A., check no. 5690.

12. At the time he signed the Oakland Title Company check in blank and provided it to Henry Manuel, defendant THOMAS MARK SMITH well knew that the Oakland Title Company checking account against which the check would be drawn had been dormant since 1990 and had a very small balance, and that there would be insufficient funds in the account to cover the check. Defendant THOMAS MARK SMITH also well knew at this time that Henry Manuel would use the blank Oakland Title Company check in his attempt to repay his debt to Robert Geissbuhler by defrauding Sterling Savings Bank.

13. On or about May 14, 1991, First of America Bank returned the Oakland Title Company check unpaid to Sterling Savings Bank because there were insufficient funds in the Oakland Title Company account to cover the check.

All in violation of Title 18, United States Code, Sections 1344(1) and 2(a).

THIS IS A TRUE BILL.
FOREPERSON

SAUL A. GREEN

United States Attorney

BLONDELL L. MOREY
Assistant United States Attorney
Chief, Economic Crime unit

ROSS I. MACKENZIE
Assistant United States Attorney

THE INDEPENDENT MORTGAGE CORPORATION PROMISSORY NOTE

$103, 500.00 Clarkston, Michigan 21st day of April, 1991

For value received the Borrower, the Independent Mortgage corporation, 5790 M-15 Clarkston, Michigan 48346 promises to pay to the order of Mr. Thomas Smith and/or their heirs of Clarkston Michigan, the principal sum of One hundred and Three Thousand Five Hundred Dollars ($103,500.00),
with interest on the unpaid principal balance from the date of this Promissory Note until paid, at the rate of 16 per cent per year.

Said principal and interest shall be paid by the Independent Mortgage Corporation in lawful money of the United States of America as follows:

DUE ON (6) Months from the date hereof. The parties may agree to successive extensions for periods not greater than six (6) months each.

This Promissory Note is made pursuant to a Credit Agreement of even date herewith made by and between the Independent Mortgage Corporation, Borrower, and Mr. Thomas Smith, Lender. Any and all issues or disputes regarding the construction, breach, or performance of duties and fulfillment of conditions of this Note shall be resolved in accordance with said Credit Agreement, a copy of which is attached hereto and incorporated herein by reference.

Borrower may prepay the principal amount outstanding in whole or in part without penalty.

Presentment, notice of dishonor, and protest are hereby waived by the Borrower.

Any notice to the Independent Mortgage Corporation provided for in this Promissory Note shall be given by mailing such notice by certified mail addressed to Borrower at the Property Address stated above, or to such other address as Borrower may designate by notice to the Promissory Note holder. Any notice to the Promissory Note holder shall be given by mailing such notice by certified mail, return receipt requested, to the Promissory Note holder at the address stated in .the first paragraph of this Promissory Note, or at such other address as may have been designated by notice to Borrower.

s/Thomas Smith

THE INDEPENDENT MORTGAGE CORPORATION
s/Henry T. Manuel
Its:___President_____

CREDIT AGREEMENT OF THE INDEPENDENT MORTGAGE CORPORATION

THIS AGREEMENT is entered into this 2lst day of April, 1991, by and between the Independent Mortgage Corporation, of 5790 M-l5 Clarkston, Michigan 48346 (hereinafter, "Borrower") and Mr. Tom Smith of Clarkston, Michigan, (hereinafter, "Lender").

In consideration of the mutual covenants and conditions
contained herein, the parties agree as follows:

1. Loan. Lender agrees to lend Borrower and Borrower agrees to borrow from lender the sum of $103,500.00.

2. Due Date. The parties agree that said sum shall be repaid to lender, in full, by Borrower, as follows:

(6) Months from the date hereof.

The parties agree that they may renew this agreement and any attendant Promissory Note to successive extension for periods not greater than six (6) months each.

3. At a rate of 16%

4. Promissory Note. The parties understand and agree that any and all loans made under this agreement shall be evidenced by a Promissory Note executed by the Independent Mortgage Corporation; a Promissory Note of even date herewith is attached.

5. Unsecured Loan. The parties agree that all loans made pursuant to this Agreement are backed by the general credit and financial strength of the Independent Mortgage Corporation are not secured

or backed by any specific collateral or security. Lender receives no right, title, or interest in specific equity, assets, income, or earnings of the borrower.

6. Business of Borrower. Borrower is engaged in the business of originating, servicing, selling, buying, and brokering mortgage notes and mortgages, i.e., loans between entities not parties to this Agreement, that are secured by interests in real estate. Borrower also engages in any and all activities necessary, incidental, and convenient to carry out the business of the Independent Mortgage Corporation.

7. Uses of Borrowed Funds. The parties agree that all or any part of monies loaned to Borrower under this Agreement may be used by Borrower as capital for the servicing, selling, buying, and brokering of said mortgages. Lender further agrees that all or any part of monies it has loaned to Borrower under this Agreement, or any renewal periods thereof may be used by the Independent Mortgage Corporation to fund any and all activities incidental to the business of the Borrower including, by way of example and not by way of limitation: overhead and administrative expenses such as purchase, rent or lease payments for office and storage space, furniture, fixtures, equipment, utilities, employee wage, salaries, benefits, taxes of any and all taxing authorities, supplies, travel, entertainment., promotional and marketing expenses and any and all other costs of doing business.

8. Limited Liability. Lender further agrees that no officer, director, shareholder, or employee of the Independent Mortgage Corporation shall be liable to Lender for losses or liabilities arising from

the conduct of Borrower's business; provided, however, that such losses or liabilities do not arise from willful misconduct or gross negligence.

9. Exclusive Right to Mange. The Independent Mortgage Corporation expressly reserves the exclusive right to decide where and to what use any and *all* borrowed monies will be made or invested.

10. Credit Agreement and not Partnership or Joint Venture Relationship. The parties acknowledge that Lender and Borrower are not Partners or Joint Venturers and the parties shall not hold themselves out to third persons or other entities as partners or Joint Venturers.

11. Because of some legal reasons, you don't want the money back to you but would like me to issue the checks to Mr. Joe Pietrzyk and Mr. Charles Conklin with the understanding that the checks will not be cashed until the deal's close and the money is in the bank that the check's are written on. One check for $50,000.00 to Mr. Pietrzyk check #110 and one check to Mr. Conklin for $53,500.00 check #111. Interest will be paid to you in cash later, after the closing. It is also agreed that these checks will not be cashed until the above has been confirmed by me. If for some reason the checks should get deposited, Mr. Smith agrees to take full responsibility.

12. Entire Agreement and Amendments. This is the entire Agreement and all negotiations and understandings have been merged herein. This Agreement may be modified, altered, or amended only by an instrument in writing executed by all of the parties hereto.

13. Notices. Any notice to be given hereunder shall be in writing and sent by Certified or

Registered Mail, Return Receipt Requested, addressed to the parties at their respective addresses stated in this Agreement. A change of address shall be designated by a notice so given.

14. Assignment of Agreement. Neither party shall have the right to assign any rights under this express written consent and prior approval of the other party.

15. Arbitration. Any and all disputes, differences, or controversies arising out of, under, or in connection with this Agreement or the breach hereof, other than equitable relief, shall be submitted to arbitration to be held in the city of Detroit, Michigan, under the rules and regulations of the American Arbitration Association, and all of the parties hereto agree to be bound by the determination of the majority of the Arbitrators. The parties also agree that any arbitration decision made pursuant to this provision shall be filed as a Judgement with any Court of competent jurisdiction for enforcement purposes.

16. Agreement Binding on Successors. This Agreement shall be binding on any and all heirs, successors, and permitted assigns of the parties.

17. Captions. The headings of these sections are for identification only and do not constitute part of this Agreement.

18. Operations, Savings, and Construction. This Agreement shall not become effective until accepted and executed by both parties. Should any provision of this Agreement be void or unenforceable, such provision shall be deemed omitted and this Agreement with such provision omitted shall remain

in full force and effect. This Agreement shall be construed under the laws of the State of Michigan.

19. Waiver. The forbearance of either party to exercise any right under this Agreement shall not preclude that party from exercising that right at a later time and shall not constitute a w iver of that right.

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date first above written. With the addition of one paragraph, per the request of Mr. Smith.

As per our phone conversation you have agreed to invest money with the Independent Mortgage Corp. from time to time and in return you will receive interest, and an assignment as collateral on different mortgages as it is needed.

Thank you
s/Henry Manuel

PLEASE SIGN AS RECEIPT & AGREEMENT
s/Tom Smith

BEST AVAIL

53

INDEPENDENT MORTGAGE CORP. (DE)
P.O. BOX 257
CLARKSTON, MI 48347

1067

74-7184/2724

5-14 1991

PAY TO THE ORDER OF Robert Grissbyhler $ 189.00

one hundred Eighty nine thousand DOLLARS

Sterling Bank
Lake Angelus Office
2986 Walton Boulevard
Waterford, MI 48329
313 674 4901

FOR

⑈001067⑈ ⑆272471849⑆ 016131081517⑈

OAKLAND TITLE COMPANY, INC.
2893 DIXIE HIGHWAY
PONTIAC, MI 48055

EXPLANATION	AMOUNT
CLOSING	189.00

74-1177/724

569

PAY AMOUNT OF ONE Hundred & Eighty Nine Thousand ——— 00 DOLLARS

DATE	TO THE ORDER OF	DESCRIPTION	CHECK NUMBER
5-8-91	INDEPENDENT MORTGAGE		

CHECK AMOUNT
$ 189.00

GENERAL ACCOUNT

FIRST OF AMERICA
FIRST OF AMERICA BANK - OAKLAND MACOMB, N.A.
PONTIAC, MICHIGAN 48056

⑈005690⑈ ⑆072411779⑆ 11-703-380⑈

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